

From

REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

FROM

HILARY TERM, 31 VIC., TO EASTER TERM, 32 VIC.

BY

S. J. VANKOUGHNET, M.A.,

BARRISTER-AT-LAW, AND REPORTER TO THE COURT.

VOLUME XVIII.

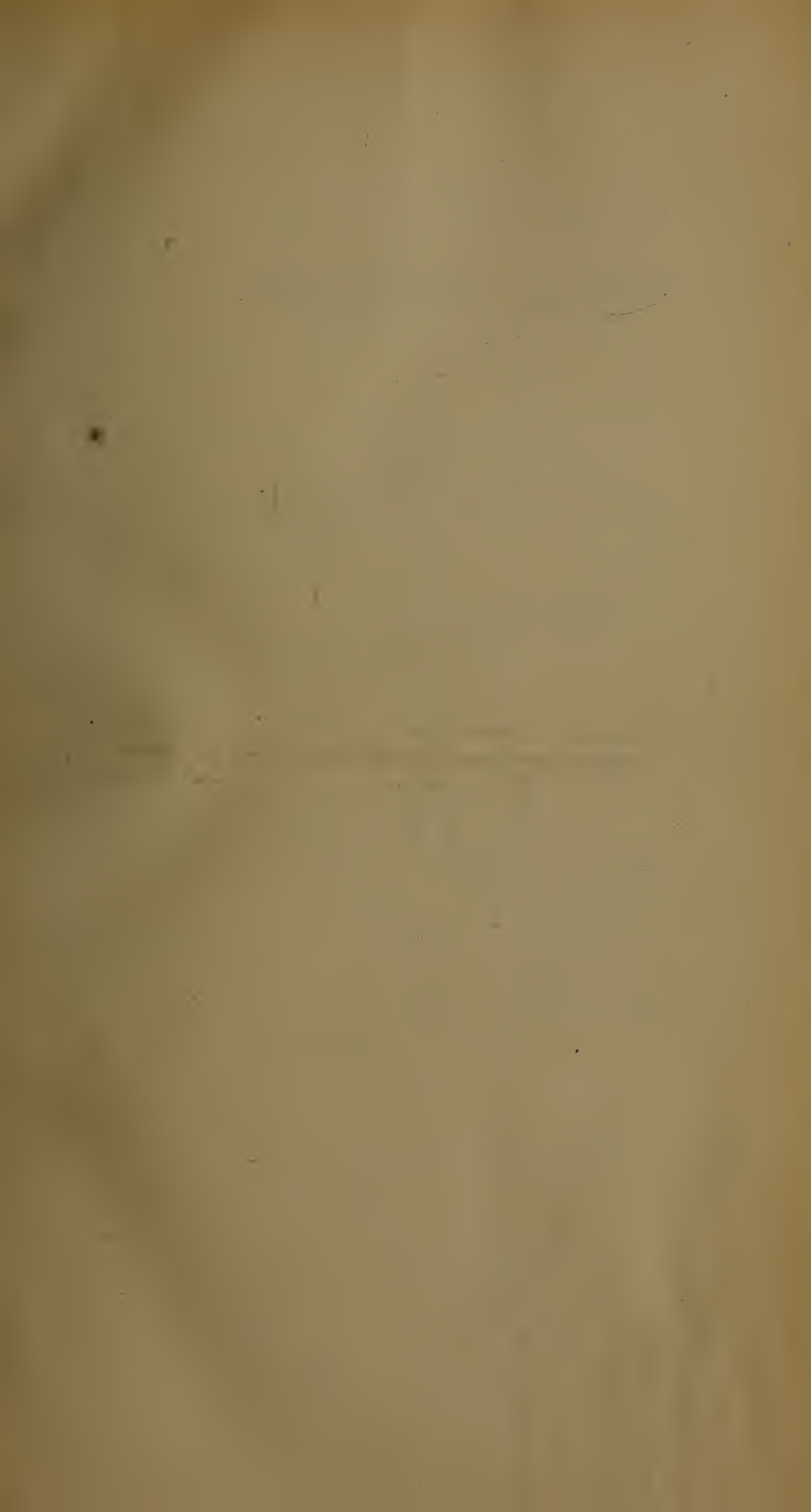
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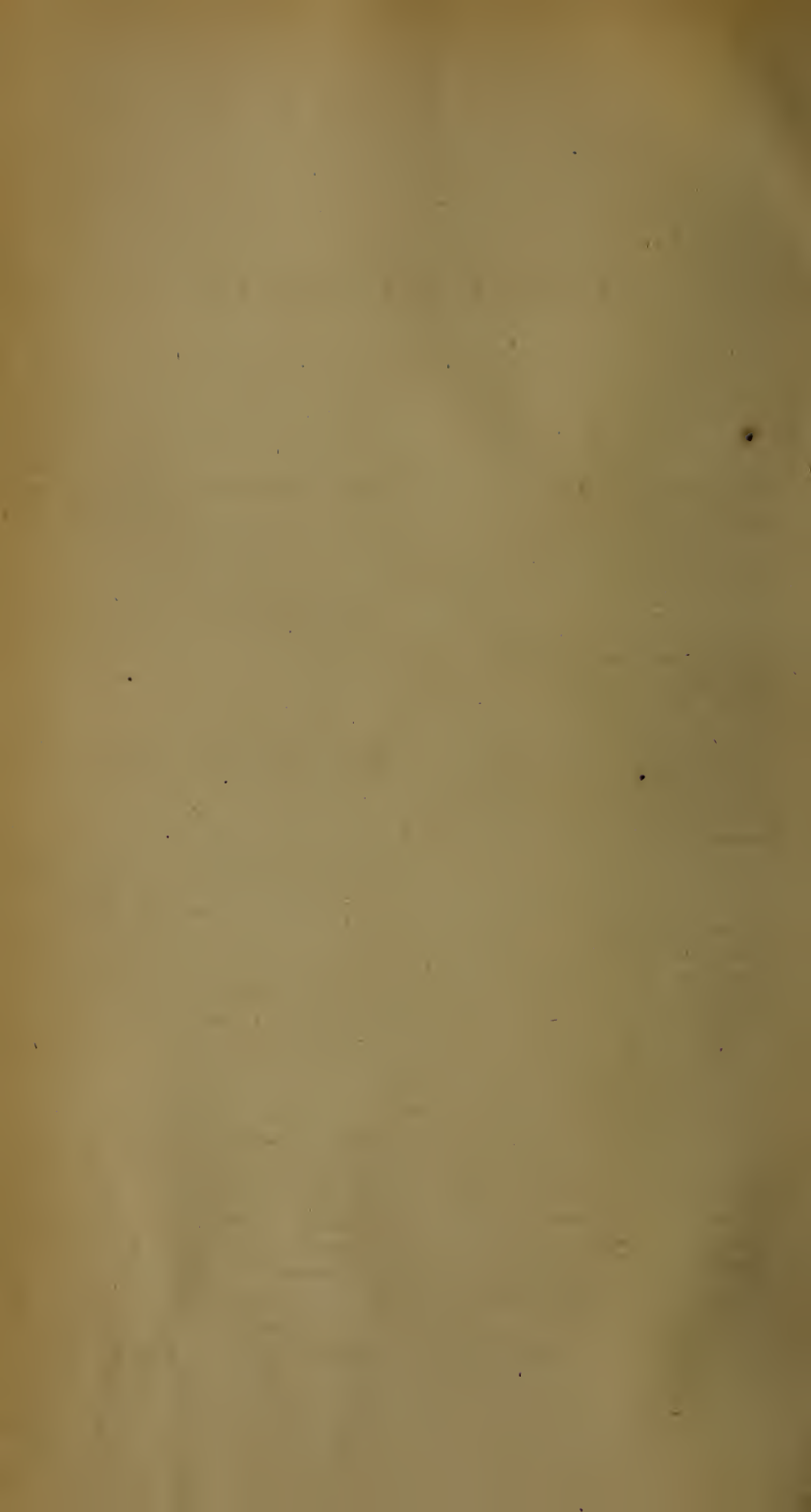


TABLE OF CASES.

A.		D.	
	PAGE		PAGE
Ætna Insurance Co., Coons v.	305	Davis v. Stewart et al.	482
Agricultural Mutual Assurance Association, Mason v. (In Appeal) ...	19	Dove v. Dove	424
Anglin v. Minis	170	E.	
B.		Eakins v. Christopher	532
Bank of Upper Canada v. Mercer	300	Elmore, Flintoft v	274
Bell v. McLean	416	F.	
Brown v. McCarty	454	Flintoft v. Elmore	274
Brown, Walsh v	30	Forge v. Reynolds	110
Buckle, Cole v.....	286	G.	
Bullen, Tiffany v.....	91	Gore Bank v. McWhirter	293
Burrowes, In re	493	Grear, McHugh v.....	488
Burrows, Lalor v.	321	Great Western Railway Co., Winckler v	250
C.		Great Western Railway Co., Ruthven Woollen Manufacturing Co. v.	316
Calcutt, McGregor v	39	Great Western Railway Co., Crawford v.	510
Christopher, Eakins v.	532	H.	
City of Hamilton v. Morrison	228	Harkley v. Provincial Insurance Co... ..	338
Cole v. Buckle.	286	Harrold v. Corporation County of Simcoe et al, (In Appeal)	9
Commercial Bank of Canada v. Smith et al	214	Hayman v. Heward	353
Coons v. Ætna Insurance Co	305	Haynes v. Copeland et al.....	150
Copeland et al., Haynes v	150	Henderson v. Morrison	221
Corporation of Burleigh v. Campbell et al	457	Heyland v. Scott et al.	52
Corporation of the County of Simcoe, Harrold v. (In Appeal)	9	Hope v. White et al.	430
Cotter v. Sutherland	357	Hopkins v. Provincial Insurance Co.	74
Covert et al., McDougall et al. v	119		
Crawford v. Great Western Railway Co.	510		
Crossland et al., Young v.	312		
Currier et al. v. Ottawa Gas Co.....	202		

I.	PAGE	P	PAGE
In re Burrowes	493	Provincial Insurance Co., Smith v. ...	223
" Moore v. Luce	446	Provincial Insurance Co., Harkley v. ...	335
L.		R.	
Lalor v. Burrowes ..	321	Rankin, Woods v.	44
Laur v. White et al	99	Reynolds, Forge v.	110
Leach, Thompson v.	141	Robertson et al., McCabe v.	471
Leahey, Welsh v.	48	Ruthven Woollen Manufacturing Co.	
Learmouth, McWhirter v.	136	v. Great Western Railway Co.	316
Liverpool and London Globe Insurance Co., Todd v.	192		
M.		S.	
Memorandum	299	Scott et al., Heyland v.	52
Mason v. Agricultural Mutual Assurance Association. (In Appeal) ...	19	Smith v. Provincial Insurance Co. ...	223
Mercer, Bank of Upper Canada v.	300	Smith v. Wallbridge	180
Minis, Anglin v.	170	Smith et al., Commercial Bank of	
Moore v. Luce, In re	446	Canada v.	214
Morrison, City of Hamilton v.	228	Stewart et al., Davis v.	482
Morrison, Henderson v.	221	Stock v. Shewan	185
		Strickland et al. v. Vansittart	463
		Sutherland, Cotter v.	357
Mc.		T.	
McCabe (Administrator) v. Robertson et al.	471	Thorne v. Torrance. (In Appeal) ...	39
McCarty, Brown v	454	Tiffany v. Bullen	91
McDougall et al. v. Covert et al.	119	Todd v. Liverpool and London Globe Insurance Co.	192
McGregor v. Calcutt	39		
McGrogan et al., Pennyman v.	132	V.	
McHugh v. Gear	488	Vansittart, Strickland et al. v.	463
McWhirter v. Learmouth	136		
McLean, Bell v	416	W.	
McWhirter, Gore Bank v	293	Wallbridge, Smith v.	180
		Walsh v. Brown	60
O.		Welsh v. Leahey	48
Ottawa Gas Co., Currier et al v.	202	White et al., Hope v	430
		White et al., Laur v.	99
P.		Winckler v. Great Western Railway Co. ...	250
Pennyman v. McGrogan	132	Woods v. Rankin	44
Provincial Insurance Co., Hopkins v. ...	74	Y.	
		Young v. Crossland et al	312

J U D G E S
OF THE
COURT OF COMMON PLEAS.

The Hon. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

Attorneys-General:

Hon. Sir JOHN A. MACDONALD, K.C.B.

“ JOHN S. MACDONALD.

IN THE COURT OF ERROR AND APPEAL.

HARROLD V. THE CORPORATION OF THE COUNTY OF SIMCOE,
AND THE CORPORATION OF THE COUNTY OF ONTARIO. (a.)

Appeal—Bridge lying between two Counties—Joint liability to maintain.

The Counties of Simcoe and Ontario are connected by a draw-bridge between the two counties, over a water-channel, called "The Narrows," on Lake Simcoe.

By sec. 327 of C. S. U. C. ch. 54, where a bridge lies wholly or partly between two counties, the councils of such municipalities shall have joint jurisdiction over it.

The bridge in question here having been left open, the plaintiff, who was passing along the highway, fell into "The Narrows" and was injured: *Held*, affirming the judgment of the Court of Common Pleas, 16 C. P. 43, VanKoughnet, C., *dissentiente*, that the defendants were liable to plaintiff in a civil action for the damage sustained by him: that the word "between" must be construed in its popular sense, and that where a bridge is constructed over navigable waters, and connects two opposite shores lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water and are divided only by the invisible untraceable line called *medium filum aqueæ*.

This was an appeal from the judgment of the Court of Common Pleas, reported in 16 C. P., 43, where the facts of the case are fully stated.

M. C. Cameron, Q. C., and *Christopher Robinson*, Q. C., for the appeal, in addition to the authorities cited below, referred to *Deveril v. G. T. R. Co.*, 25 U. C. 517; *Webb v. Port Bruce Harbor Co.*, 19 U. C. 615, 623; *Joy v. McKinn et al.* 1 C. P. 13, 28.

(a) Argued 25th January, 1867, before Draper, C.J., VanKoughnet, C., Richards, C.J., Hagarty, A. Wilson, J. Wilson, J.J., Mowat, V.C.

R. A. Harrison, contra, cited *Reg. v. Inhabitants of Brightside Bierlow*, 13 Q. B. 933 ; *Erie City v. Schwingle*, 10 Harr. 384 ; *City of Dayton v. Pease*, 4 Ohio 80 : Con. Stats. C. ch. 28, secs. 74, 75 ; Con. Stats. U. C. ch. 54, sec. 331, sub-sec 2.

DRAPER, C.J. (January 2nd, 1868.)—Without hesitating for an instant that the respondent, the plaintiff below, has a good right to recover damages for the very serious injury he has sustained, I have experienced much difficulty in adopting a conclusion on the question from whom he should so recover.

As I understand, this bridge was a public bridge, coming within the 316th section of the Municipal Act, and as no question on the point has been raised I assume there was a proclamation declaring it to be no longer under the control of the Provincial authorities, in which case it should thenceforth be controlled and kept in repair by the Council of “ the municipality.”

What municipality is the question. There is a reference to a by-law or by-laws on this subject, and a by-law of the Council of the County of Ontario was admitted, but it forms no part of this Appeal-book, and therefore whether it purports to be passed under the 339th section of the Statute, or whether it is founded on the assumption that this bridge comes within the definition contained in the 327th section, does not appear.

It is upon this question only that I feel any doubt of the correctness of the judgment appealed from. Is this bridge one which lies wholly or partly *between* these two counties ? Does the word “ between ” mean that the road or bridge separates the two counties, so that a traveller might go along it being neither in one county or the other, but between both, or might pass across it from the limits of one county over the limits of another ? Such was the interpretation given to the 12th Vic. ch. 81 s. 39, in *Wood v. the County of Wentworth and the City of Hamilton*, 6 U. C. C. P. 101, an enactment very closely resembling that now under consideration. To illustrate the difference, take an ordinary township

having roads between every concession, and side-roads running between lots,—say at every fourth and fifth lot. It could not be accurately said that the concession roads ran between lots, or that the side roads ran between the concessions. Or take Yonge Street, which, running north and south, divides or passes between several townships in its extent. It could not be said that the roads crossing this from east to west, and continuing onward through townships divided by Yonge Street, were roads *between* such townships; or suppose two townships, the east side of one separated from the west side of the other, by nothing more than a surveyor's line, but with a road running east and west through both; could that road be called a road *between* the townships, which only continued across the line marked by the Surveyor as the limit of each?

In the present case, if “The Narrows” are not part of either county, but are a water channel separating them, then a bridge across “The Narrows,” is undeniably between the two counties; but if each county, or the townships (Orillia and Mara) of the counties where “The Narrows” are, reach *ad medium flum aquæ*, is it a substantial distinction that the thread that divides them is an imaginary line in water, instead of a surveyor's line on land, in either case length without breadth? It was my first impression, that on this view of the question the judgment could not be supported. It does not appear by the case that the Township of Mara, in the County of Ontario, and the Township of Adjala, in the County of Simcoe, are conterminous. Looking at the maps and at the formation of the shores of Lakes Simcoe and Couchiching, I feel little doubt that the actual surveys of those townships extended only to the water's edge. Indeed, Lake Couchiching seems only to be the lower part of Lake Simcoe, gradually widening from “The Narrows,” and contracting again into the river Severn. The description of the County of Simcoe contained in the Territorial Division Act, Cons. Stat. U. C. ch. 3, declaring the islands in Lake Simcoe lying wholly or for the most part opposite to the County of Simcoe to be part of that county, would, if considered by

itself, exclude the idea that any of the townships of which the county consists extend into those waters, and the description of the County of Ontario in the same Statute contains nothing from which it can be inferred that its boundaries extend beyond the water's edge. Looking no further, and bearing in mind that the Narrows are a navigable channel across which it has been found necessary to erect a draw-bridge, in order to afford passage to steam-boats and other vessels, there would seem every reason to hold that this bridge, or part thereof, was strictly speaking between the two counties.

But there are other sections in the Territorial Act which must not be overlooked.

I apprehend that when the Statute was passed Lake Simcoe was held to extend to the River Severn, and that that part which is popularly called Lake Couchiching was not, nor, that I am aware of, has been recognised as a distinct body of water by any enactment. Then, in order to understand section 8, we must first read section 5, which declares that the "limits of all townships lying" on certain rivers and lakes which are named and are all waters separating the Province from the United States, "shall extend to the boundary of the Province in such lake or river, in prolongation of the outlines of each township respectively, and, unless herein otherwise provided, such townships shall also include all the islands, the whole or the greater part of which are comprised within the outlines so prolonged." Then, by section 8 "the limits of the townships on" certain waters, among which are Lake Simcoe and the River Severn, "and any other rivers, lakes and bays not hereinbefore mentioned, shall in like manner extend to the middle of the said lakes and bays, and to the middle of the main channels of the said rivers respectively, and, unless herein otherwise provided, shall also include all the islands, the whole or greater part of which are comprised within the outlines so prolonged."

It appears to me that by making all the islands in Lake Simcoe, which are wholly or for the most part opposite to the County of Simcoe, part of that county, without regard to

which side the middle line of the lake those islands lie, is to make a different provision with regard to them from that which would obtain under the general terms of the eighth section; and as the first section of the Statute especially declares that the several counties shall consist not only of the townships enumerated, but that certain of such counties shall also include other lands as thereafter mentioned, that the enactment placing these islands in the County of Simcoe, excludes, as to the islands in Lake Simcoe, any operation of the eighth section, and possibly might be held to prevent the extension of the side-lines of the townships as mentioned in that section.

But on the whole, while freely admitting the difficulties of reconciling all parts of the Act and of meeting every objection which a literal adherence to the language used might give rise to, I think that, looking at the question before us, we may properly give to the word "between" the popular rather than the more limited, though possible more rigidly correct sense, and that we should hold that when a bridge is constructed over navigable waters and connects two opposite shores lying in different counties, we should hold such a bridge to be between such two counties, and that they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water and are divided only by the invisible, untraceable line called *medium filum aquæ*.

I think the appeal should be dismissed with costs. (a.)

VANKOUGHNET, C.—I think the Court of Common Pleas rightly held that a county is liable for damages sustained in consequence of the non-repair or insufficient construction by it of a road or bridge over which it exercises control. It is true that the county is not by the Municipal Act, in

(a) NOTE.—At common law, if a bridge be within a franchise, those of the franchise are to repair it. If the bridge be part within the franchise and part within the gildable, so much as is within the franchise shall be repaired by those of the franchise, and so much as is within the gildable by those of the gildable; and so it is if it be in two counties, *mutatis mutandis*.

express terms, made liable for such default; but I take it that a corporation charged with, or assuming, the custody of a road or bridge, and having funds, or the means of obtaining funds, by exacting tolls, or levying a rate upon the members of the corporation, with which to make repairs, is, at common law, bound to keep such road or bridge in an efficient state. The difficulty that existed in the case of *Russell v. Men of Devon* (2 T. R. 667) does not present itself here, for the inhabitants of a county in this Province are an incorporated body or municipality, and as such possess corporate property and rights, and are subject to many duties, and can sue and be sued. The same obstacle that existed to suing the inhabitants, as such, of a county or parish, stood in the way of a suit against the Justices in Quarter Sessions, (supposing them to be otherwise liable), for they were not incorporated and were a shifting body of individuals merely. Though section 341 of the Consolidated Municipal Act transfers all the powers, duties, and liabilities of the Magistrates in Quarter Sessions in regard to roads, &c., to the Municipal Corporation of the county, it does not limit the powers or liabilities of the corporation to those conferred or imposed upon the Quarter Sessions. One reason, probably, why the corporations of townships, cities, towns and villages, were in express words made liable to individuals in a civil suit for damages, was that, with rare exceptions, all roads lying within those several municipalities are under their respective control and charge. The mere fact of a road passing through and from one township to and into and through another adjoining township, or other municipality, without interruption or change of line or character, does not make it a county road. Each township and other municipality controls the portion of such continuous road lying within its borders and is responsible for it, unless the road be on other grounds a county road. The Statute does not remove the common law liability, though it does not state or enact it.

I am of opinion, however, that this action must fail, because the bridge in question is not a bridge lying wholly

or partly *between* a county and an adjoining county; not, in fact, a bridge lying between these two counties, within the meaning of sec. 327 of the Municipal Act. These two counties embrace certain townships which touch and adjoin one another, separated only by a geographical line, unsubstantial and invisible. They are not divided by any bridge; and strictly speaking nothing does or can lie between them. When you speak of something lying between two other places or things, you mean, in the accurate use of language, something lying between the boundaries or limits of the other two places or things; something dividing them, or within the borders of that which does divide them. You don't in such a case employ the word "between" as meaning something common to two parties or places, as when you speak in the common ordinary terms of a well or a stable as in use between two parties, or common to both, and which, consistently with the meaning of the words thus employed, may be wholly on the premises of one of the parties. If you were asked, "Does anything in the shape of a road, bridge or river, lie between two countries?" you would not say, "Yes, there is a road or a river which passes through the one country into the other." The Legislature have made no distinction between roads and bridges in this, nor, indeed, so far as I have seen, in any other section of the Act; and perhaps the case of this bridge is a single and exceptional one, not within the thought or view of the Legislature at the time, and is therefore a *casus omissus*. That we cannot help: our duty is to interpret the language of the Legislature as we find it, and not, contrary to its meaning, to employ it to cover a case which the Legislature has not provided for, or has overlooked. In this country are many roads continuous and unbroken, which, as one line of road, traverse two or more counties, running from one into the other, without any visible boundary or mark to fix the limits of the road or portion of road within any one of such counties. Take the road known in former times as "Dundas Street," which commencing, I believe, as far west as London, was continued and

travelled over to the eastern boundary of Upper Canada. This road passes of course through many counties. Would it be pretended that the different counties through which this road ran, were to unite and exercise joint jurisdiction over it? If not in the case of such a road, neither, I think, in the case of a bridge, situate as this is, which does not lie between two counties, but lies partly in one and partly in another, in unbroken length, as in the case of a road running from one county into another. Each municipality, as the law stands, can alone, in my judgment, be made responsible for the maintenance and repair of so much of such a bridge as lies within its borders, as in the case of a road similarly placed, unless when the road or bridge is assumed by the county; and if this in the case of a bridge be inconvenient, the Legislature must do, as they have not done, make the distinction and provide the remedy; for, as I have already said, roads and bridges are placed by them on the same footing, and this action is made to rest upon a supposed statutory liability, and not upon any liability at common law. The Legislature have, I think, however, made their own meaning plain by the language they have employed in several sections of the Statute.

In the 327th section this joint jurisdiction is given over a road or bridge lying between two municipalities, "although such road or bridge may so deviate as to be wholly or in part within one county." The Legislature, here, I think, shew clearly, that what is meant is a road or bridge running along or between the borders of two counties. The language quoted, if not entirely out of place, would be unnecessary and useless in reference to a road running through or from one county into another; for it must, as a matter of course, be partly in one county and partly in the other. It could not deviate so as to be partly or wholly *in some places* in the one county. It must necessarily be in both counties, otherwise it would be a road having its limits entirely within the one county. When you are dealing with a continuous road passing through two counties, you would not speak of it as a road "deviating so as in some places

to be wholly or in part within one of the counties." Section 339 gives the County Council exclusive jurisdiction over every road or bridge dividing different townships, "although such road or bridge may so deviate as in some places to lie entirely or in part within one township."

Section 341, which transfers to the Municipal Council the powers of the Magistrates in Quarter Sessions, provides that in case "any such road or bridge lies in two or more counties, it shall belong to the Council of such counties;" that is, as I understand it, each county shall own so much of the road as lies within its boundaries; for no joint jurisdiction is given anywhere except under the 327th section, and I have already, I think, shewn that that does not apply to a road running through several counties. Now, in this 341st section the Legislature makes the distinction, as to roads which lie partly in one county and partly in another, and roads which lie between two counties. If they had meant, under the 327th section, to include roads which run from one county into another, they would have employed the word "between" in the 341st section, instead of using the words "lying in" two counties.

Again, in sub-section 3 of section 342 the language is, "roads or bridges running or being within one or more townships, *or* between two or more townships of the county, *or* between the county and any adjoining county or city, &c." This shews that the Legislature was alive to the distinction and difference in roads lying in one or more townships, and roads lying between them. I suppose no one would think of applying this section to Yonge street, for instance, which runs from and out of the City of Toronto into the County of York, so as to treat this street as a road lying *between* the city and county, and thus give the county jurisdiction over it, even in the city; which must be the inevitable result, if, under the word "between," is to be classed a road passing through two adjoining municipalities. So, again, in section 343, any township may aid any adjoining county "in making, &c., &c., any road or bridge lying between the township and any other municipality." Does

this mean a road passing through and from one township into and through another? Does it mean that the township, besides maintaining the road within its own limits, shall or may also aid in maintaining it where it has passed beyond those limits and is within another municipality? Surely not. For these reasons, I think that the two municipalities, the defendants here, did not acquire under the Statute any joint authority over the bridge in question, and, therefore, could not be made jointly liable for any defect in it.

If I were prepared to agree in the premises of the learned Chief Justice, as to the limits of the counties, I would come to the same conclusion as he has; but it seems to me that the counties must be co-extensive with the limits of the townships composing them respectively, and these by the Territorial Act meet in the middle of "The Narrows." I think each county must keep in repair the portion of the bridge lying within it.

This defence does not appear to have been urged in the Court below, nor to have been made a ground of nonsuit, nor the subject of a motion against the verdict for the plaintiff, nor is it made a distinct ground of appeal here; but it has been urged here, in argument, without objection, and I suppose under the first reason for appeal, and if available, is, I apprehend, too patent to be overlooked.

RICHARDS, C.J., HAGARTY, A. WILSON, J. WILSON, J.J., and MOWAT, V.C., concurred with DRAPER, C.J.

Per Curiam—*Appeal dismissed, with costs.*

MASON, (Plaintiff in Court below) *Appellant*, v. THE AGRICULTURAL MUTUAL ASSURANCE ASSOCIATION OF CANADA, (Defendants in Court below) *Respondents*.

Appeal—Insurance—Fire policy—Condition as to incumbrances—Vendor's lien—False swearing.

One of the conditions of a Policy of Insurance was that every incumbrance affecting the property at the time of assurance, must be mentioned in the application, otherwise the policy should be void. The property in question had been conveyed to the plaintiff and his wife by one S. and wife, in consideration, as expressed in the deed, of a then subsisting indebtedness by S. and wife to plaintiff, and of a bond by plaintiff alone to support S. and wife during their lives, who by the said deed released to plaintiff and wife all their claims upon the property. In his application for assurance plaintiff stated the property to be unencumbered:

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 493, that there was no lien for purchase money, and that the property was not encumbered.

Another condition of the Policy was that any fraud or attempt at fraud, or false swearing, on the part of the assured, should cause a forfeiture of all claims under the Policy. After the loss by fire plaintiff made a statement under oath, that he was absolute owner of the property at the time of the fire, whereas, under the conveyance to him and his wife, he was only jointly interested with her therein:

Held, reversing the above judgment, J. Wilson, J. *dissentiente*, that he was not guilty of false swearing within the meaning of the condition; for that the word "false", as used there, meant wilfully and fraudulently false (of which defendants had themselves at the trial acquitted plaintiff), whereas it was merely an incorrect description of his title with which he could be charged.

Remarks upon the equitable doctrine of the vendor's lien for unpaid purchase money.

This was an appeal from the judgment of the Court of Common Pleas, reported in 16 C. P., 493, where the facts of the case are fully stated.

H. Cameron and *Moss*, for the appellant, in addition to the authorities referred to in the Court below, cited *Anderson v. Fitzgerald*, 4 H. L. Ca. 484, per Lord St. Leonards, 512; *Herms v. Marine Insurance Company*, 2 E. & E. 317; *Mackenzie v. Vansickle*, 17 U. C. 226; *Dixon v. Gayfere*, 1 DeG. & J. 655; *Clarke v. Royle*, 3 Si. 499; *Buckland v. Pocknell*, 13 Si. 406; *Hughson*

(a) Argued 11th March, 1867, before Draper, C. J., VanKoughnet, C. Richards, C. J., Hagarty, A. Wilson and J. Wilson, J.J., and Mowat, V.C.

v. *Davis*, 5 Gr. 488, & 596, per Esten, V. C.; *Bolton v. Gillespie*, 8 Gr. 232; *Paine v. Chapman*, 6 Gr. 338; *Quealton v. Hardisty*, 8 E. & B. 232; *Stokes v. Cox*, 1 H. & N. 533; *Phil. Ass. Co. v. Myles*, 8 Ohio Rs. 241; *Hoffman v. Wes. Mar. Ass. Co.*, 1 Lous. 215.

C. S. Patterson, contra, cited *Duckett v. Williams*, 2 Cr. & M. 348.

VANKOUGHNET, C. (January 2nd, 1868):—In this case there are two issues; one, whether or not there was at the time of the plaintiff's application for assurance, any incumbrance upon the premises; the other, whether or not the plaintiff was guilty of false swearing, within the meaning of the language of the policy, in stating under oath, after the loss by fire, that he was the absolute owner of the property at the time of the fire, when in truth he was not such absolute owner, but only a tenant in common with his wife, under a conveyance to them jointly, or, at most, owner in fee of a moiety, and tenant by the courtesy in the other moiety. With regard to the first issue, I am of opinion that no lien for purchase money existed here after the execution of the conveyance by Seney and wife to the plaintiff and his wife. The conveyance was in consideration of a debt due to plaintiff, and of a bond by plaintiff to support and maintain Seney and wife during the natural life of each of them.

Looking at the form of the deed, which winds up with a release by the grantors of all their claims upon the land; that the consideration is expressed to be a debt past due and a bond by *one* of the grantees only for the payment or provision of maintenance during two lives; I think we should hold that it would be contrary to the intention of the parties to subject the land to any lien for this maintenance, and that therefore it neither was preserved nor exists.

The second issue, I think, is narrowed merely to the question whether or not the plaintiff was guilty of *false* swearing in the statement on oath which he sent in to the Company. The issue is not whether that statement was true in itself; whether or not the plaintiff was the absolute owner of the

property at the time that statement was made ; but whether in asserting by affidavit that he was, when he was not absolute owner, he was thereby guilty of *false* swearing within the meaning of the condition which provides against it. I think the plea can receive no other shape or interpretation, for to the false swearing it points, and on it relies ; and it would be entirely changing the issue it thus presents to say that the mere fact of plaintiff not being absolute owner would sustain the plea. If the allegation as to false swearing was stricken out of the plea, there would be nothing left on which to form an issue in respect of the "condition" which the plea rests on. The question on this issue then is, was the plaintiff guilty of false swearing within the meaning of the said condition, when on giving in a statement of his loss by fire, he stated in his affidavit accompanying it that he was the absolute owner of the buildings consumed ? The defendants admitted at the trial that this statement of the plaintiff on oath was not wilful or fraudulent, but contended that its being untrue deprived the plaintiff of all remedy under the policy. Before proceeding further, let us, in the face of this admission, see how the defendants themselves have construed the language, "false swearing, &c." See plea, which says that "the said statement was false swearing within the meaning of said condition, in this &c., &c." ; and "that the plaintiff was thereby guilty of fraud and false swearing within the meaning of the said condition in the statement he so made." Do not the defendants here assert that the false swearing was fraudulent, for no other fraud but the false swearing is alleged ? and do they not themselves here construe "false swearing, within the meaning of the said condition," to be a fraudulent statement on oath ? and is this contention supported in the face of their admission ? For aught that appears on this issue, and on the pleadings generally, the defendants were aware of the exact state of plaintiff's title, and were not therefore in any way deceived in regard to it when they granted an insurance. They don't, at all events, complain that they were. If they had been, the case presented would have been

very different; for an Insurance Company may well choose not to know or learn anything except through the person seeking insurance, and may say to him, "Upon the faith of your statements we grant you an insurance. You warrant everything you state in regard to certain particulars on which we require information: with their materiality, or with your *bona fides* of statement in regard to them, we will have no question. You run the risk of stating the truth: we make no further enquiry; and if your statement, on the faith of which we issue the policy, be untrue in any respect, the policy is valueless." The assured, accepting a policy on such conditions, has no right afterwards to complain that the assurer insists upon them. The meaning of the word "false," as distinguished from "untrue" statement, was much discussed in the case of *Anderson v. Fitzgerald* (4 H. L. 484.) It did not become necessary in that case to give any judicial decision upon the distinction, though Lord St. Leonards expressed a strong opinion that the word "false," associated with the word "fraudulent," meant a wilfully false statement. If we look at any Law Dictionary, we find the word "false" used as implying something designedly untrue; deceitful; as shewing an intent to perpetrate some treachery or fraud; as meaning something more than mere untruth, which of course it embraces; an untruth told with or for a purpose. We do not speak of "untrue pretences," when we wish to designate an offence of that character; but we say "false pretences." So we say "false measures," "false" weights, "false swearing", not "untrue swearing," as indicating perjury, or a designed mistatement: Tomlin's Law Dict. "False"; Law Lexicon; Beauvier's Law Dictionary.

But whatever construction the Court might put upon the word "false" statement, when used as the basis or representation upon which an assurance has been procured, and in that respect as a warranty, it seems to me that the words "false swearing" used in the particular condition under consideration here, must mean *wilful* false swearing. The condition has reference not to any thing on which the policy

was based or procured, but to a statement after the policy has been, *pro tanto* at all events, exhausted; after a loss has been incurred; and to facts which the assurer can inquire into for himself. This statement then on oath does not bind any one or conclude anything. The assurer had not acted on it in making the policy, and need not in any way act upon it under the policy. He can ascertain the truth for himself, if he doubts the statement, and he is not therefore misled by it, as he would be in case he had entered into a contract on the faith of it. The Court, I think, should struggle against giving to the word "false," as here used, the same meaning as the milder term "untrue", when the necessary effect of such a construction would be, that after a loss incurred any incorrect statement on affidavit, however innocently or accidentally made, would be to deprive the assured of all that he had honestly contracted and paid for. Suppose that, in a description of loss under such a condition as the present, the assured should honestly swear that six chairs had been destroyed by fire, when only five had been destroyed, and the other was missing, stolen, or carried away in the confusion; and suppose the assured in a day or two discovers this error and corrects it in a further affidavit; if the defendant's position be correct, that the plaintiff swearing to what was untrue forfeits all claim under the policy, no correction by the defendant of his first statement, however innocently made, could be of any avail: the defendants would rely upon the first affidavit as having contained an untrue statement, and as sufficient within the meaning of the condition to destroy the plaintiff's claim. They could do so as successfully in the case proposed as in this case, if the word "false" is to be treated as meaning nothing more than the word "untrue." Does not one's sense of justice revolt at a construction that would produce such a result? The defendants have, no doubt, like any other assurer, a right to stipulate for and require that the assured shall make and furnish a true statement of his loss and of such particulars as the assurer wishes to know; and there are many facts which no one probably can so

well supply as the assured. To guard against imposition or fraud, the penalty of forfeiting *all* claim under the policy is provided for in case a false statement be made. The assurers may insert the hard condition, that an incorrect statement, though not dishonestly made, shall cause a forfeiture; but then they must do so unusual a thing in plain and unmistakable language, so that those dealing with them may know the risk they run, and be fully aware of the folly of entering into such a bargain. I think, in its popular sense and application, the word "false" is used as implying something more than a mere untruth. If you think a person is making an assertion which he intends to be correct, but which in fact is incorrect and therefore untrue, you don't say, "Sir, that is false," "you are telling a falsehood," "you are a liar," as you would do if the person were designedly and knowingly making it for his advantage and to your injury.

I think, looking at the common and ordinary legal and popular use and definition of the word "false," that we should decide contrary to what both parties intended its meaning in this condition should be, if we were to hold that it was satisfied by shewing merely that some portion of the plaintiff's affidavit of loss was incorrect and therefore untrue, although not wilfully and fraudulently so. The Court of Queen's Bench, in *Fowkes v. Manchester and London Life Ass. Association*. (3 *Best v. Smith*, 917), felt called upon to take every circumstance and every word into consideration in order to give to the policy there such a construction as laymen of ordinary intelligence might be supposed to understand when they framed their contract; and I think here that neither of the parties to this contract could have intended or meant that under the words "any fraud or attempt at fraud, or false swearing," should be classed a statement ignorantly or inaccurately made. The defendants, judging them by the language of their plea, evidently did not think so. In my opinion the verdict for the plaintiff should stand, and the rule to enter a nonsuit ordered by the Court below should be discharged with costs.

DRAPER and RICHARDS, C.JJ., HAGARTY and A. WILSON, JJ., concurred.

J. WILSON, J., adhered to the opinion expressed by the Court below.

MOWAT, V. C.—False swearing, in its ordinary sense, undoubtedly means swearing to what the deponent knows to be untrue; swearing corruptly; swearing which is morally, wilfully false, not merely mistaken. Does the expression mean more in the stipulation which is in question here?

I believe the learned Judges of the Court of Common Pleas came to the conclusion they did with reluctance, and solely because the point seemed to them bound by authority. I think, however, that the cases are not to the effect supposed, and really do not apply, and that the present case is of the first impression. In the cases relied upon, the question was whether the false statement avoided the contract unless shewn to the satisfaction of a jury to be material, as well as false. The matter adjudicated upon was, not whether under the stipulations in question wilful falsehood was necessary, but whether falsehood in a *material* point was necessary to be shewn, in order to avoid a policy.

In *Anderson v. Fitzgerald* (4 H. L. 484) the point for which the case has been cited was only alluded to incidentally, and that by but two of the three law lords who took part in the judgment. I refer to Lords Brougham and St. Leonards. The Lord Chancellor, Cranworth, said nothing about this point, so far as the report of the case shows. The stipulation there was very special, and might very well have been held to make any false statement sufficient. Lord Brougham thought the term “false”, in the policy there, did not mean morally false, but that it simply meant untrue (p. 506), and Lord St. Leonards took the opposite view. The language of the policy was this: “If any fraud shall have been practised on the said company, or any false statements made to them, in or about the obtaining or effecting

of this insurance, this policy shall be null and void"; and this is what Lord St. Leonards said on this point: "When I use the word "false" in a sense connected with fraud, what do I mean? I mean not only that which is untrue, but I mean that which is malicious—wilful—which is criminal, which is false in an odious sense, and to the man's knowledge; and, therefore, the construction which, after a great deal of consideration, I should put upon this part of the clause certainly is, that it refers to a wilful fraud, a wilful mis-statement."

The Judges who were called in were also divided on the point, though a majority seem to have taken the view afterwards adopted by Lord Brougham; for Mr. Baron Parke, who delivered the opinion of the Judges, said: "A doubt may possibly exist whether the word "false" is to be understood in the sense of false in point of fact, or morally false, though, I believe, most of us think it is not to be limited to moral falsehood; but there seems to us to be no doubt that if the statements are false, in whatever sense we understand that word, being used in effecting that insurance, this proviso operates," the opinion a jury might be led to form of the materiality or immateriality of the mis-statements being of no moment, as the report proceeds to shew. I may add, that the matters, in regard to which the mis-statements occurred, were such that, if these statements were untrue, the party of necessity knew them to be so, and their materiality was alone, therefore, in controversy.

Cazenove v. The British Equitable Insurance Co. (6 C. B. N. S. 437, S. C. 5 Jur. N. S. 1309, and 6 Jur. N. S. 826, Exch. Ch.)—see also *Geach v. Ingall* (14 M. & W. 95), *Ducket v. Williams* (2 C. & M. 348)—was also the case of mis-statements before the policy, and there, too, the matter misrepresented was within the personal knowledge of the party; but the word false did not occur in the policy. The word untrue is that on which the case turned, and it was held that the answers being clearly untrue, the policy was avoided, though there was no intentional fraud, and that the opinion of the jury as to the materiality of what was mis-stated was of no consequence.

But assuming, though these cases do not decide, the true doctrine really to be, that where a policy expressly provides that any "false" statement in obtaining it should render it void, an untrue statement, though made in error and not fraud, has that effect—does it follow that a condition, declaring that any false statement after a loss should cause a forfeiture of the policy, gives that effect to a statement which is merely untrue, but not wilfully or intentionally untrue? Does it follow that words used before the Company has entered into any engagement, and the same words used after a loss, are, of necessity, to be construed in precisely the same way? If a provision, that any untrue or false statement in obtaining an insurance shall render void the policy, would cover a statement untrue but not wilfully false, does it necessarily follow that a provision, declaring, in reference to subsequent proof of loss, that any attempt at fraud or false swearing on the part of the assured, shall cause a forfeiture of all claim under the policy—is to receive the same construction? The contrary seems to me the proper view.

It is of great importance that a Company should be allowed to be its own judge before it contracts, as to the materiality of every statement made by the applicant. For many facts proper to be considered before accepting a risk, the Company must entirely depend on the statements of the applicant; and the opinion formed at the trial by twelve men taken indiscriminately from the jurors' lists, or by a Judge, is not a test of materiality by which any Insurance Company would like to be bound in accepting risks; and "such requirement" of exact accuracy in statements made to induce a Company to insure "is," as Lord Cranworth observed in the House of Lords, "extremely reasonable. That we need not speculate on; but the reason for making such a stipulation is obvious, and is explained by this very case. Whether certain statements are or are not material, where parties are entering into a contract of life insurance, is a matter on which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the

parties entering into that contract should determine for themselves what they think to be material; and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy." But a stipulation that, after the risk is accepted, and the premium paid, and the policy executed, and a fire takes place, an inaccurate statement made unintentionally, whether material or not, shall cause a forfeiture of the policy, is extremely unreasonable. If the cases relied upon by the respondents are authorities at all for their contention, they shew that any inaccurate statement in an affidavit furnished after the fire, however immaterial such statement may be, as well as however unintentional the inaccuracy, would create a forfeiture. I cannot imagine this to have been the intention. The principal reasons which demand that construction, in the case of an inaccurate statement before the risk is accepted, are inapplicable to an accidental mis-statement in the proofs with which the Company is to be furnished after the accident insured against has actually occurred.

The clause in question, though in use in England, does not appear to have been the occasion of judicial interpretation there. In the United States it has been expressly held that a wilful mis-statement is necessary, under it, to cause a forfeiture after a fire; and I think that construction is in entire accordance with the spirit of English rules, as well as with the intention of the parties, and the good sense and justice of the case.

My brother Wilson, in his judgment in the Court below, intimated an opinion, though the judgment does not proceed upon it, that the *Seneys* had no lien on the land. As this opinion may throw doubt on what has for several years been the settled doctrine of the Court of Chancery in like cases, it is proper to make some allusion to it. The point is one of equity and not of law, and was the subject of express adjudication in this country eight years ago in *Paine v. Chapman*

(7 Gr. 179), when the Judges were Chancellor Blake, the late Vice-Chancellor Esten, and my brother Spragge, and has been often acted upon since, and acquiesced in by all parties. That case was not cited to the Court of Common Pleas, nor the case of *Richardson v. McCausland* (Beatt. 457), on which *Paine v. Chapman* proceeded. See also *Tardiffe v. Scrughan* (cited 1 B. C. C. 423), and *Matthew v. Bowler* (6 Hare 110), and the observations of Lord Cranworth on these cases in *Gayfere v. Dixon* (1 DeG. & J. 662). The unhappy practice which prevails in this country, of the owner of a farm making over his property in his old age to a son or son-in-law, on the undertaking of the latter to maintain the grantor and his wife, has led to the jurisdiction being invoked on behalf of the old people in several instances, and to their preservation by means of it from hopeless poverty.

I think the judgment of the Court below should be reversed.

Per Curiam—*Appeal allowed.*

THORNE V. TORRANCE.

Appeal—Insolvency—Assignment not in accordance with Act of 1864—Execution—Attachment—Interpleader—Priority.

Certain debtors executed a deed of assignment for payment of creditors, but not in accordance with the Insolvent Act of 1864. The defendant, subsequently to this deed, issued a writ of execution against the debtors, and then took proceedings in insolvency, under the Act of 1864, against their estate, for the general benefit of creditors:

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 445, that the assignment was an act of bankruptcy and void, and could not be set up, on the issue joined, for any purpose, and that, therefore, the defendant, the execution plaintiff, though petitioner in insolvency, could, notwithstanding his proceedings in insolvency, founded on his judgment at law and the assignment, enforce his execution against the debtor's estate to the postponement of the rest of the creditors; *Hagarty, J., A. Wilson, J., and Mowat, V. C., dissenting.*

Semble, that on application to the proper Court, defendant might have been restrained from asserting any right under the execution at law.

Appeal from the judgment of the Court of Common Pleas reported in the 16 C. P. 445, where the facts of the case are fully stated.

Robert A. Harrison, for the appeal, in addition to the authorities cited in the Court below, referred to *James v. Whitebread*, 11 C. B. 406; *Coates v. Williams*, 7 Ex. 205; *Irving v. Gray*, 3 H. & N. 34; *Forman v. Drew*, 4 B. & C. 15, 18; *Noad v. Jowett*, 4 B. & C. 20; *In re Wheeler*, 11 W. R. 988; *Blumberg v. Rose*, 14 L. T. N. S. 365; 17 Geo. III. ch. 29; *Doe Howson v. Waterton*, 3 B. & Al. 149; *Tay. Ev.* 3 ed. p. 154; C. S. U. C. ch. 26, s. 18; *Gottwalls v. Mulholland*, 15 C. P. 52, S. C. 3 Err. & App. 194; 27 & 28 Vic. ch. 17, sec. 8, sub-sec. 3; *Congreve v. Evetts*, 10 Ex. 298; *Elder v. Beaumont*, 8 E. & B. 353; *Ex parte Spicer*, 12 L. T. N. S. 55; *Ex parte Philpotts*, 10 Jur. 717.

S. Richards, Q. C., cited *Lancaster v. Elce*, 8 Jur. N. S. 1066; *Ilderton v. Jewell*, 9 L. T. N. S. 815, S. C. 10 Jur. N. S. 747; *Newton v. Chantler*, 7 Ea. 143; *Graham v. Chapman*, 12 C. B. 85; *Seibert v. Spooner*, 1 M. & W. 714; *Chase v. Goble*, 2 M. & G. 930; *Leaker v. Loveday*, 4 M. & G. 972; *Goldschmidt v. Hamlett*, 6 M. & G. 187; *Graham v. Lynes*, 7 Q. B. 491; *Edwards v. English*, 7 E. & B. 564; *Gadsden v. Barrow*, 9 Ex. 514; *Holden v. Langley*, 11 C. P. 407; *Doyle v. Lasher* 16 C. P. 266; *Ex parte Lindsay*, 1 Atk. 220; *Ex parte White*, 4 B. C. C. 114, S. C. 2 Ves. Jun. 9; *Ex parte Callow*, 3 Ves. Jun. 1; *Linnitt v. Chaffers*, 4 Q. B. 762.

VANKOUGHNET, C. (February 1, 1868)—The majority of the members of the Court are of opinion that the judgment of the Court below should be affirmed, and on this short ground, that the assignments of the 1st and 5th of June, 1865, being destroyed, as being acts of insolvency, upon and in respect of which a writ of attachment in insolvency issued, are useless for any purpose, and cannot be set up, after such proceedings in insolvency, against the writ of *fiery facias*, under which the Sheriff had seized the goods before the attachment was delivered to him, upon the issue as shaped in this case. This

(a) The case was argued on the 28th January, 1867, before the same Judges as the last.

is quite irrespective of the question as to whether the assignment of the 5th June would have been valid except for the Insolvent Act. It was clearly an act of insolvency, of which advantage was taken in due time; and the assignee or trustee named in it could no longer hold the goods under it. These passed to the assignee in insolvency, subject to the lien created by the prior writ in the Sheriff's hands, and he, and not the assignee named in the deed of assignment, must administer the property covered by that deed, subject to any prior liens or charges on it.

The issue which the parties in this case have chosen to contest is, "were the goods at the time of the seizure under the said writ of *fi. facias*, the property of the said William Thorne (the assignee under the deed of assignment of the 5th June, and also the assignee in insolvency), as against the said David Torrance" (the execution creditor)? We think that *on this issue* the goods were not the goods of Thorne, as against the writ of *fi. facias* of Torrance. The assignment of the 5th June became avoided, as already stated, under the Insolvent Law, and could no longer cover or hold the goods. The Sheriff had seized under the writ of *fi. fa.* before the attachment in insolvency was delivered to him; and, under the Statute of 1864, there was no relation back of the attachment to the act of insolvency, so as to cut out an intervening writ, and nothing to deprive such intervening writ of its priority. The Statute of 1865, subsequently passed, shews this clearly enough, for it provides for the priority of an attachment over a writ of execution previously in the Sheriff's hands. I, myself, was, on the argument of the case, strongly inclined to agree with the opinion so lucidly expressed and so strongly put by Mr. Justice Adam Wilson in the Court below. It did then, as it does now, seem to me most inequitable that Torrance, having a writ in the Sheriff's hands and being met there by this prior assignment, which, *per se*, might, perhaps, have been held by this Court good against him, should, in order to get rid of it, initiate upon and in respect of it, and of his judgment at law, proceedings in insolvency, and having

thus got rid of the deed, and got the estate of the debtor into the Insolvent Court, be able to say to the creditors there, "My writ, which might have been defeated by this very assignment, on and by means of which I have brought the estate here, shall now sweep away all that estate, because it is prior in point of time to the attachment which I have just procured to be issued." And yet, upon this issue—the writ of *fiери facias* being in the Sheriff's hands, not displaced, having been acted on, and action on it not having been restrained in any way—how can we say that the goods are not covered by it, as against the subsequent writ in insolvency? It is said that Torrance is estopped as by an act *in pais* from claiming under this writ. I do not think we can say this upon the issue joined here. The writ is in full force at law. It has lost none of its efficacy there so far, and can we say, looking at the operation of the writ at law, that Torrance's act in placing the estate in insolvency amounted to anything more than this, "I place it there, subject to the operation of my writ, so long as I am allowed to act upon it." I do not see how he can be estopped on such pleadings as these from asserting his right under the *fi. fa.* He has not induced any one to alter his position. He has not abandoned any right for the sake of any benefit or gain to himself. He has not said either by act or word, "I abandon my writ to get the estate into insolvency." On the contrary, he has held by and asserted his writ. I do not, therefore, see how he is estopped here from insisting upon it. But it is another question whether he might not, at or before the time this interpleader issue was ordered, or afterwards; or, whether, notwithstanding the delay, he might not even now, on terms, be disabled, by a proper application to one or other of the Courts, from insisting upon his writ as against the proceedings in insolvency which he, as petitioning creditor, set in motion upon the very judgment which this writ seeks to execute, and upon the very assignment which at the time stood in its way. Such intervention has taken place in England, and generally there by application to the Lord Chancellor, under the old

Bankruptcy Law. It is for the parties to consider whether such an application would now avail. It is one thing, however, to set aside or prevent the use of a writ because of conduct, and another to deny it, while in force, its legal operation.

DRAPER, C. J., RICHARDS, C. J. and J. WILSON, J., concurred with VAN KOUGHNET, C.

A. WILSON, J.—It was not determined in the Court below whether the deed or deeds of assignment was or were void, on the alleged ground that they gave a priority to certain creditors, by reason of providing for the payment of scheduled creditors only. The Chief Justice intimated a strong opinion that they were void for this reason. I stated very shortly I did not think them void. The ground of judgment was that, assuming them to have been perfectly good under the U. C. Act, ch. 26, sec. 18, they were nevertheless an act of bankruptcy, and void as against the defendant, and that the defendant, who was the plaintiff and petitioner in insolvency, could, after turning over the debtor's estate into the Insolvent Court, to be there administered for the general benefit of creditors, enforce his own execution, which was subsequent in order of time to the assignment, and withdraw so much of the estate again from the Court, and administer it for his own personal benefit by the hands of the Sheriff. From this point of decision I differed from the majority of the Court.

The case was argued before us in appeal, not only on the point which was not much noticed by Counsel in the Court below, but on the other exception also, that the assignments were fraudulent and void, because affording a preference to the scheduled creditors, and so excluding any others, if there were others, and therefore the defendant, an execution creditor, was entitled to proceed at law in disregard of the assignment, and in disregard also of his own voluntary proceedings in insolvency, to procure the administration of the estate there.

It is necessary, therefore, to consider the validity of the

assignments, as well as the right of the defendant to enforce his execution, after putting the estate into the Insolvent Court.

I have nothing further to say on this last point than what I stated in the Court below. I shall therefore confine myself to the effect and operation of the assignments.

There were two assignments executed, the first one, which is dated the 1st of June, 1865, contained provisions for carrying on the business of the debtors, so as to wind it up, which were thought to be objectionable. This one was made to the same person, who is trustee in the second assignment, and it was filed in the County Court. Afterward, on the 5th of the same month, the second assignment was made by reason of doubts which it recites were entertained respecting the validity of the first deed, and its sufficiency to carry out the purposes thereby contemplated.

There may be a question whether the first deed was executed and delivered absolutely, or only subject to the approval and acceptance of the creditors generally, and if on such a condition or understanding, then the parties could waive it and accept a more formal and appropriate one: *Ex parte Somerville v. Tresidder* (11 Jur. N. S. 29, 13 L. T. N. S. 350). I conceive, therefore, the second assignment may be looked to as the one binding and operative between the parties, if it can be maintained as sufficient in itself. The chief objection to it is that it is invalid by reason of the preference which it affords to the scheduled creditors.

The first question is, whether it does afford any such preference in fact.

It is made between J. Parsons, and C. Parsons, the debtors, of the first part, Wm. Thorne, the plaintiff, trustee, of the second part, "and the several other persons, creditors of the said J. & C. Parsons, whose names are set forth in the schedule hereunto annexed, marked C., of the third part." Then it recites that the parties of the first part are indebted "to the parties of the second and third parts in the several sums set opposite their respective names in the schedule hereto annexed, marked C., which they are unable to pay in

full, and have therefore proposed to assign all their estate to the party of the second part for the benefit of their creditors as hereinafter mentioned." Then, after paying the expense attending the trust, the trustee is next to pay "ratably and proportionably, and without any preference or priority to themselves, the said trustee and the several other persons, parties hereto of the third part, the several debts or sums set opposite to their respective names in the schedule hereunto annexed, marked C."

The trustee also is not to be liable otherwise than as trustee "for the payment of the debts and liabilities of the parties of the first part, and to the extent of the trust estate;" and it concludes thus, "This indenture is made and executed with the intent and for the purpose of removing the objection to the said indenture [of the 1st of June], and of enabling the trustee to carry out the intention of said assignors in applying the produce of said estate in or towards the satisfaction of the creditors of said assignors, ratably or proportionably, without preference or priority of any kind."

Does this assignment exclude any creditor from becoming a scheduled creditor? If it do, then it is void as affording a preference; if it do not, why should it be void?

It must be observed that this is a trust deed: all the estate is transferred to a trustee, and all suits in respect of it must be prosecuted in his name.

What is then to prevent the trustee from placing other creditors' names, if there be any such, in the schedule? And would not a Court of Chancery compel him to do so, if the deed were made for creditors generally, and not for a privileged class? *Harrby v. Wall* (1 B. & A. 103); *Whitmore v. Turquand* (30 L. J. Chy. 345); *Borell v. Dann* (2 Hare 440); *Clapham v. Ackinson* (4 B. & S. 722-730); *Hickmott v. Simmonds* (L. R. 2 Eq. 462).

Now, it is quite manifest that the debtors were desirous of getting a discharge in full from all their creditors, and they supposed that all their creditors would schedule their names, or that the trustee, at any rate, would do so for them; for while the deed provides that the persons whose names are

mentioned in the schedule, are to be paid, the deed also shews, in the first recital, that the assignment was made "for the benefit of their creditors, as hereinafter mentioned;" and this "hereinafter mentioned" applies as well to the clause just referred to, for paying the scheduled claims, as to the proviso following it, for "payment of the debts and liabilities" generally; and also to the last clause of carrying "out the intention of the assignors, in applying the produce of said estate in satisfaction of the creditors" [generally] "of said assignors, ratably or proportionably, without preference or priority of any kind."

There is nothing in the Provincial Act which declares a deed shall not provide for the debts being scheduled, and that it shall be void if it do: the enactment is against giving preference to one creditor over another, and so long as this is not done the deed is good.

The question, then, must depend upon whether the provisions of the deed are so made as to make certain specified names, which are contained in a schedule, just as if they had been set out in the deed itself, the only persons who are to be paid; or whether the schedule is not merely mentioned as the place where all creditors shall have their names and demands entered, if they intend to avail themselves of the assignment.

If the deed is to be construed in the manner lastly mentioned, then there is no one excluded from participation in the estate, because all the creditors have the option of coming in and executing it:" *per* Bovill, C. J.; and because "The absence of express words to include all the creditors does not render the deed bad:" *per* Smith, J., in *McLaren v. Baxter* (L. R. 2 C. P. 559). Now, the distinction must be kept in mind between deeds executed and valid under our own Act, and those which are executed under the 192 sec. of the Imperial Act, 24 & 25 Vic. c. 134; because assignments under the Provincial Act bind none, but those who are voluntarily parties to them. No one is compelled to assent to or become a party to them, and his rights cannot be prejudiced or affected in any way

by what his fellow creditors choose to do ; whereas, under the English Act, whatever a majority in number, representing three-fourths in value of the creditors, whose debts respectively amount to £10 and upwards, shall choose to do, is binding and conclusive upon the non-assenting creditors, so long as *all* creditors are placed on the same footing, and the conditions are not unreasonable or contrary to the Act.

By this Statute the creditors may compound with the debtor for any sum they like, and may absolutely release him from all liability, and they may bind the non-assenting creditors "as if they were parties to and had duly executed the same ;" and this may be done, although the transaction be a mere composition without any *cessio bonorum*: *Clapham v. Ackinson* (4 B. & S. 722, 730).

In England, therefore, it has been held, that if the assignment be made only to those who schedule their claims, or who should execute the instrument, the arrangement is not within the Statute ; because until they do one or the other they are not parties to the deed, and so they are not on the same footing with those who are in fact parties to it.

But the fact of the deed being made to those creditors who execute it will not avoid it, if it appear at the same time that those who do execute constitute the proper majority in number and value who have power to bind the rest, because the fact of the statutory majority having given their assent shows, "that it must have been intended to be an arrangement between the debtor and the whole body of his creditors:" *per* Blackburn, J., in *Clapham v. Ackinson* (4 B. & S. 722) ; and Williams, J., in the same case, in the Exchequer Chamber, said : "The first objection was, that it was made with the creditors who signed, and not with all ; but all the creditors have the option of coming in and signing, and if the requisite majority sign, and all have the option of signing, the objection on this ground fails."

This case shews conclusively that, as we have nothing to do with majorities in number and value, and as we cannot bind non-assenting parties, that a deed made in favour of all creditors who shall execute the deed of assignment, would

be valid in this country, as respects the 18 sec. of c. 26, and so of all creditors whose names shall be contained in the schedule to the deed annexed.

Now, this is the construction which in my opinion should be placed upon the deed in question, and which it is entitled to receive, to maintain it for the protection of the general body of creditors, and to prevent a great wrong being done by one of them for his own special gain and advantage, in contravention of the general policy of the law.

In my opinion the judgment of the Court below should be reversed.

HAGARTY, J., concurred with A. WILSON, J.

MOWAT, V. C.—I think the second assignment was valid, as it appears to name all the cases except the attorneys who drew the assignment, and who chose to exclude from it the debt due to themselves. I think the assignee in insolvency can successfully resist the claim of the execution creditor, at whose instance the attachment was issued, but whether he can do so in this suit, or must proceed by petition in bankruptcy, is doubtful. A majority of the Judges being of opinion that the latter is the only remedy, that must hereafter be taken to be the true rule in such cases.

Appeal dismissed, with costs.

REPORT OF CASES
IN THE
COURT OF COMMON PLEAS.

HILARY TERM, 31 VICTORIA, 1868.

Present :

THE HON. WILLIAM BUELL RICHARDS, C.J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

MCGREGOR V. CALCUTT.

*Survey of towns and villages—Work upon the ground—Plan—C. S. U. C.
ch. 93, sec. 35.*

Under the latter part of sec. 35 of ch. 93 C. S. U. C., the work upon the ground in the original survey of towns and villages, to designate or define any lot, shews its true and unalterable boundaries, and will over-ride any plan of such lot.

TRESPASS, *quare clausum fregit*.

The land in question was composed of lot No. one, west of and adjoining Lake Street, and south of and adjoining Robinson street, in the Village of Peterborough East, (now Ashburnam) in the County of Peterborough, according to the survey of Deputy Provincial Surveyor Driscoll.

Plea—Not guilty.

The cause was tried at the Spring Assizes of 1867, held before J. Wilson, J., at Peterborough.

Plaintiff at the trial put in his deed from one Mark Burnham to him, dated 29th July, 1857. By this deed the

land was described as follows: "Containing by admeasurement three roods of land, be the same more or less, being composed of lot number one, west of and adjoining Lake Street, and south of and adjoining Robinson Street, according to the survey of Deputy Provincial Surveyor Driscoll."

Several witnesses were called, who assisted Driscoll in making the survey and in running the line between plaintiff's and defendant's lot. They stated that they ran over the bank and into the low ground, and assisted to put down posts for plaintiff across the bottom of the lot in the bog, and extending to the dry land north and south.

The plaintiff contended that defendant took off his lot thirty feet on one side and eight feet on the other.

The registered plan shewed no western boundary of the lot.

The jury, by consent of parties, went and viewed the premises.

It was contended for the defendant that Driscoll's plan shewed that the western boundary was three chains from the street; that the northern boundary shewed no distance, but a street stopping apparently at less than three chains; and that the western boundary did not appear to go west beyond the foot of the hill.

The defendant proved by Mr. Burnham that he owned the land, and his father before him; that Birdsall made the original plan and survey; that the traces of the survey had disappeared, and he directed Driscoll to survey for him.

In reply, plaintiff put in the deed from Zacchæus Burnham to him, dated 23rd July, 1844, of town lot No. 2, west of Lake Street and south of Robinson Street, commencing at the south-east angle of the lot where a post had been planted, &c.

The defendant's counsel objected to the reception of the deed from Zacchæus Burnham, as evidence in reply. The Judge, on being asked to construe the deed, stated he should hold that the map and survey on the ground must be considered by the jury, and they would be asked under the

evidence to say where the western boundary of plaintiff's land was. The defendant's counsel contended that the deed should be construed by the map, which was conclusive evidence of the survey under the Statute, and not by the work on the ground. The learned Judge thought the work on the ground over-rode the map.

The jury found a verdict for plaintiff, damages \$1.

In Easter Term last *Hector Cameron* obtained a rule to set aside the verdict, and for a new trial, on the ground, amongst others, of misdirection on the part of the learned Judge, in ruling that the length of the boundary and size of the plaintiff's lot were not conclusively determined by the deed to him and the survey of Driscoll, as shewn by the registered plan; and in leaving it to the jury to determine the questions at issue, on evidence of work done on the ground, and in stating that such work over-rode the plan.

The rule was enlarged to Michaelmas Term last, when *S. Richards*, Q. C., shewed cause: The verdict was according to the right of the case, and ought not to be disturbed. The Statute (C. S. U. C. ch. 93) ought to receive the same interpretation, whether applied to town or township lots.

Hector Cameron contra: The plan ought to govern, for when made to register, then the real intent of the owner of the land became known, and by it the lot is only three chains deep. The language used in the 35th section of the Upper Canada Surveyors' Act differs materially from that employed in the section referring to cities, towns, &c., laid out by the Crown, in the 17th section, and also differs from that used in section 14, relating to townships as well as cities and towns. When referring to the surveys of Government lands, the lines, blocks, gores, commons, posts, (at the angles of lots) surveyed and planted under the authority of the Executive Government, are declared to be the true and unalterable boundaries, &c., of the townships, blocks, lots, &c., respectively. The words of the 17th section, as applicable to

towns, shew that the posts to mark the lots shall be the true and unalterable boundary of such lot, &c.

The 35th section speaks of all lines which have been run, and the courses thereof given in *the survey, and laid down on the plan thereof*.

The plan in these surveys is of great importance, and on it must be laid down the roads, streets, lots, &c., and the width and length of all lots, the courses of the side lines, with such information as will shew the lots, concessions, tracts or blocks of land of the township where the town or village is situated. Under 41st section a certified copy of the map or plan is to be taken as evidence of the original plan and survey of such town or village in all Courts in Upper Canada.

The description in plaintiff's deed means lot No. 1, according to Driscoll's plan.

RICHARDS, C. J., delivered the judgment of the Court.

The 35th section of cap. 93, of Con. Stat. U. C., in relation to survey of lands owned by private persons into a town or village plot, differs in some of its provisions from the 17th section, where lands owned by the Crown are surveyed into city, town or village lots; and this difference partly arises from a wish to provide that private parties may change their plans of survey and division of lots, &c., when third parties have not acquired an interest in such lots and plans; and the first part of the enacting clause of the section directs that all allowances for roads, streets, or commons, which have been surveyed in such towns and villages and laid down in the plan thereof, and upon which lots of land, fronting on, or adjoining such allowances for roads, streets or commons, have been or may be sold to purchasers, shall be public highways, streets or commons. It further provides that all lines, which may have been or may be run, and the courses thereof given in the survey of such towns and villages and laid down in the plans thereof, and all posts or monuments, which have been or may be placed or planted in the first survey of such towns and villages, to

designate or define any such allowance for roads, streets, lots or commons, shall be the *true* and unalterable lines and boundaries thereof respectively.

The 37th section of the Statute permits the owner of a village or town, or any original division thereof, to amend or alter the first survey and plan of the town or village, or original particular division thereof, provided no lots of any land have been sold fronting on or adjoining any street or common where such alteration is made.

Under the latter part of the 35th section it appears to me that the posts or monuments planted in the first survey of the town or village, to designate or define any lot, shall be the true and unalterable boundaries of such lot. It does not say, as shewn on the plan, or according to the plan, but that the post planted to designate the boundary shall be the true and unalterable boundary. I think, therefore, that the learned Judge was right in telling the jury if the post in dispute was planted in the survey as the boundary of the western and of the northerly line of the lot in question, that it would continue to be such boundary, whether the plan shewed it to be so or not.

I do not mean to say that the owner of the land might not shew that this post was not finally planted as the corner of the lot; that after it had been planted he changed his plan of survey and placed another post to define that particular lot; but I do not think the Judge could properly tell the jury that merely because the plan filed did not shew the lot to extend back the distance that would carry it to the post, therefore it only extended the distance mentioned in the plan.

The deed itself grants the lot to plaintiff according to the *survey* of Provincial Surveyor Driscoll, not according to the plan of such surveyor filed in the County Registry Office, if that would make any difference.

I think, therefore, there was no misdirection on the point suggested, as to construing the effect of the deed.

Rule discharged.

WOODS V. RANKIN.

Landlord and tenant—Distress—Purchase by landlord—Execution against tenant—Interpleader—C. S. U. C. ch. 45, sec. 4.

Plaintiff distrained upon his tenant, and at the sale, *with the latter's consent*, purchased portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant, and partly by the delivery of the tenant to him :

Held, reversing the judgment of the County Court, that though the general principle there laid down is correct, that no one can sustain the double character of seller and buyer, yet that where, as in this case, the tenant consents to the purchase by the landlord, there the sale can be supported; and therefore, in this case, *Held*, that the property sold passed to the plaintiff, and that he could hold it against defendant's execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual and continued change of possession under C. S. U. C. ch. 45, sec. 4.

THIS was an interpleader issue, and an appeal from the Judge of the County Court of the County of Huron.

Woods, the plaintiff, had rented to one King a farm at the yearly rent of \$120. On the 26th of September, 1866, two years' rent was in arrear, and on the 28th of January following plaintiff distrained for the same, and at the sale of King's property under the distress, the plaintiff, with King's assent, purchased three horses and a wagon, the goods in question in the interpleader issue. After the goods had been sold they remained at King's, where the sale took place on Saturday, till the following Monday. On this day the plaintiff sent his servant for the horses. King allowed him to take one horse, and he himself took the other two to plaintiff and delivered them to him, as having been purchased at the sale. On the same day they entered into the following agreement :

"It is hereby agreed between Ninean Woods and John King that the former shall and hereby does rent unto the latter one mare in foal, one horse, and one iron-axle lumber wagon, on the following terms and conditions, viz., that the said John King shall pay \$3 a month for use of same, and give as security for hire and for the safe return of them upon demand the chopping and clearing done by him, John King, on lot 2 in Lake Road, east concession of Stanley, together

with so much more as may be done; also, that he will use said team and wagon only for the legitimate purposes of the farm, and will not take them out on the roads for pleasure purposes; also that said Ninean Woods may at any time and without notice to said John King enter upon said premises and take and keep possession of said horses and wagon, by forfeiting only so much as may be due of the then current month's rent, and no more—rent to commence from this day; to all of which we agree, as witness our hands this 5th day of February, 1867.

(Signed) NINEAN WOODS,
“ JOHN KING.”

“ Witness,
(Signed) W. H. WOODS.”

Before the distress the defendant Rankin had sued King, but after the sale he recovered judgment and sued out execution against his goods, and caused the horses and wagon in his possession to be seized, as well as the horse in the possession of Woods, contending that the property had never passed from King, and was then his.

On the trial the question of the *bona fides* of the transaction was left to the jury, who found for the plaintiff. Leave was reserved to the defendant to enter a nonsuit, if in point of law the property in the goods never passed from King to the plaintiff.

The defendant accordingly, in the following County Court term, obtained a rule *nisi* to enter a nonsuit, which was subsequently made absolute, and from this judgment the plaintiff now appealed.

C. Robinson, Q. C., for the appeal, was stopped by the Court.

McMichael, contra, cited *King v. England*, 10 Jur. N. S. 634, per Blackburn, J.; *Lyon v. Weldon*, 2 Bing. 334; *Jones v. Sawkins*, 5 C. B. 142; *Richards v. Johnston*, 4 H. & N. 660.

J. WILSON, J., delivered the judgment of the Court.

The learned Judge has correctly laid down the general propositions of law regarding sales under distress for rent. Here, the sale would have passed nothing without the consent of King, but we think the evidence shows that he consented that the plaintiff should take the horses and wagon at the price for which they were nominally sold, as satisfaction for so much of the rent. In *King v. England* (4 B. & S. 782) the goods distrained were those of a stranger found upon the demised premises. The landlord, instead of selling them, took them at the condemned price. The Court held the property did not pass to him or to his vendee, for they had never been sold, and he could not take them so as to pass the property in them. But in that case the practice is recognised, that if the tenant, being the owner of the goods, consents to the landlord's taking them at the appraised price in satisfaction of the rent, the property will pass.

At the time of the sale there was no one but King to question the transaction; but if he was willing, and in good faith consented that the plaintiff should have the goods in satisfaction of his rent, then the property in them passed to him. In this view of it the learned Judge overlooked the effect of what King did to change the property in the goods. In *Jones v. Sawkins* (5 C. B. 142), which was an action in debt for use and occupation, the defendant pleaded that during the continuance of the demise and before the commencement of the suit, the plaintiff took the defendant's goods as a distress, they being of sufficient value to satisfy the rent and costs; that the plaintiff never sold the goods, but retained them until just before the commencement of the suit, when, with the assent of the defendant, he received and accepted them in satisfaction of the rent. The Court held the plea good, by way of accord and satisfaction.

In disposing of the rule to enter the nonsuit the learned Judge said, "I rest my judgment in the case on the broad ground that it was not competent to the plaintiff to become

purchaser at the sale; for as it took place under his own distress warrant, he must therefore be regarded as vendor, and no one can be allowed to sustain at the same time the two characters of seller and buyer."

The case involved other considerations; for although the sale or the assent to the plaintiff having the goods may be good as between him and King, was it good as against an execution creditor? Was the sale accompanied by an immediate delivery, and followed by an actual and continued change of possession, so as not to require that the sale should be in writing and registered? And was there not at least one horse always in the possession of the plaintiff, to which he was entitled? But suppose there had been no sale, and the goods at the time of the seizure on the defendant's execution were the property of King; was not this plaintiff entitled out of these goods to claim from the Sheriff one year's rent of the premises upon which the goods were seized by the Sheriff?

The jury were only charged as to the *bona fides* of the transaction. This they found for the plaintiff. The other questions of fact were not submitted to them, and we think the learned Judge overlooked, as we have already intimated, the consent of King that the plaintiff should take the goods in satisfaction of his distress.

The appeal will be allowed, and a new trial ordered in the Court below, without costs.

Appeal allowed, without costs.

WELSH V. LEAHY.

Common Schools—C. S. U. C. ch. 64, secs. 50, 51, 57, & 91, sub. sec. 2.—*Pleading.*

Declaration by a school teacher against defendant as sub-treasurer of school moneys, setting out an order signed by *the local superintendent* of schools in favour of plaintiff upon defendant, as such sub-treasurer, directing him to pay plaintiff \$27.80, and charge to account of *county assessment* for 1866, and alleging a refusal by defendant to pay plaintiff in pursuance of such order, with a claim for a mandamus, and £50 damages.

Held, on demurrer, declaration bad, as not shewing that the check or order was drawn on the order of the school trustees, and in setting out a check void on its face, because drawn upon a fund over which the local superintendent had no control, and in not shewing that the sub-treasurer had money in his hands belonging to the school section, or that the county council had made provision to enable him to pay the amount.

The declaration demurred to, in which there were two counts substantially the same, is sufficiently indicated by the head-note to the case.

J. A. Boyd, for the demurrer, cited *Bush v. Beaven*, 1 H. & C. 500; *Taylor v. Jermyn*, 25 U. C. 86; *Benson v. Paul*, 6 E. & B. 273; *Ward v. Lowndes*, 1 E. & E. 940, 956; *Reg v. Mun. Coun. of Bruce*, 11 C. P. 575; *Hastings v. Bann. Nav. Co.*, 14 Ir. C. L. Rs. 534; *Smith v. Collingwood*, 19 U. C. 259; C. S. U. C. ch. 64, sec. 27, sub-secs. 9, 22, sec. 96, sub-secs. 1, 2; *Seymour v. Maddox*, 16 Q. B. 326; *Haacke v. Marr*, 8 C. P. 441; *Worthington v. Hulton*, L. R. 1 Q. B. 63.

T. H. Bull, contra, cited *Norris v. Ir. Land Co.*, 8 E. & B. 512; C. S. U. C. ch. 64, sec. 91, sub-sec. 2, ch. 23, secs. 1–8.

J. WILSON, J., delivered the judgment of the Court.

This declaration has been framed upon the assumption that a duty is cast upon sub-treasurers of school moneys and on county treasurers to pay the local superintendent's order, whether lawful or not, on behalf of a school teacher, in anticipation of the payment of the county school assessment, whether he has money in his hands for that purpose

or not, and that the order or check, as it is called in the Statute, is lawful without the order of the school trustees.

This we think is not the law, for the primary duty is cast upon the municipality of the county to make the necessary provision to enable the county treasurer to pay the amount of such order, and that the check of the local superintendent is not lawful unless authorized by the order of the trustees.

In regard to raising the necessary funds for sustaining common schools, the 50th section of the Act respecting Common Schools enacts, that each county council shall cause to be levied yearly upon the several townships of the county such sums of money for the payment of the salaries of legally qualified common school teachers as at least equal the amount of school money apportioned by the chief superintendent of education to the several townships thereof for the year.

The 51st section enacts that the sum actually required to be levied in each county for the salaries of legally qualified teachers shall be collected and paid into the hands of the county treasurer on or before the fourteenth day of December in each year; but notwithstanding the non-payment of any part thereof to such treasurer in due time, no teacher shall be refused the payment of the sum to which he may be entitled from such year's county school fund, but the county treasurer shall pay the local superintendent's lawful order on behalf of such teacher, in anticipation of the payment of the county school assessment, and the county council shall make the necessary provision to enable the county treasurer to pay the amount of such order.

The 57th section enacts that, if deemed expedient, the county council shall appoint one or more sub-treasurers of school moneys for one or more townships of the county; in which event each such sub-treasurer shall be subject to the same responsibilities and obligations, in respect to the paying and accounting for school moneys.

In enacting these clauses the Legislature took it for

granted there would always be money in the hands of the county treasurer, from which he would be able to pay all orders drawn upon him by the local superintendents for the payment of the salaries of teachers, in anticipation of the school fund, in case it were not paid into his hands at the proper time.

The duty of the defendant was not to pay the order out of his own money, but from money of the school fund, if he had it, and if not, then from any money he might have in his hands, from which the county council had authorized him to pay it.

If the treasurer or sub-treasurer has the money and refuses to pay a lawful order of the local superintendent, a mandamus would lie; but if he has not, no duty lies on him, and therefore no mandamus ought to be granted.

The plaintiff, in the second count, on the same statement of facts as on the first count, claims damages against the defendant for not paying the local superintendent's order, and a mandamus. For reasons already given, we think he cannot maintain his claim to damages on the second count, nor to have the mandamus prayed for. Assume for the moment, that the defendant had money of the county school fund in his hands, or other moneys from which he was authorized to pay it; was the order set out, a lawful order, which the defendant, as sub-treasurer, was bound to pay?

The declaration avers that the defendant was sub-treasurer of school moneys for the Township of Douro. He could, as such, only have so much of the county school fund as had been apportioned to the common schools of that township, or an authority to advance other moneys in anticipation of it. The order, to be lawful, ought to have been drawn upon that fund, and drawn in accordance with the 2nd sub-sec. of sec. 91 of the Act. The duty of the local superintendent was to give to any qualified teacher, but to no other, on the order of the trustees of any school section, a check upon the county treasurer or sub-treasurer for any sum of money apportioned and due to such section.

The local superintendent cannot give a check for the payment of money to a teacher without the order of the trustees of the school section, nor for any money which has not been apportioned and due to such section. But it is not averred in the declaration, nor does it appear on the face of the check set out, that it was given on the order of the trustees; nor that it was drawn upon the money due and apportioned to that section. It is in these words, "Douro, January 22nd, 1867: To sub-treasurer school moneys, Douro: Pay to Mr. Michael Welsh, or order, twenty seven $\frac{80}{100}$ dollars, and charge to account of county assessment for 1866. ROBERT CASEMENT, Local Superintendent Common Schools, Douro, \$27 $\frac{80}{100}$." We can understand why a check should not be given, unless on the order of the trustees. They themselves may have advanced to the teacher his salary from moneys levied by their authority, and may desire to leave the school fund for a subsequent period.

We can see no reason why this order was not drawn properly, both in form and substance, for the chief superintendent has taken great pains to furnish local superintendents with forms and directions in the School Manual. The local superintendent had only authority to draw an order on the sub-treasurer for money apportioned and due the section where the teacher had taught. He did not draw it from money so apportioned, or from any specific money, but directed the sub-treasurer to charge it to the account of county assessment for 1866. The order of the trustees, if any such existed in this case, was his authority for drawing the check, and to the form now in use there might be added, "in accordance with the order of the trustees, dated the day of ."

We are, therefore, of opinion that this order, as it is called in the declaration, is not a legal check in accordance

As to the right to mandamus, see *Kendall v. King* (17 C. B. 483); *Hall v. Taylor* (E. B. & E. 107); *Ward v. Loundes* (1 E. & E. 940-956); *Benson v. Paul* (6 E. & E. 273); *Norris v. Irish Land Company* (8 E. & B. 512); *Bayle v. Beavan* (1 H. & C. 500).

with the Statute, and cannot be enforced, and both counts are bad, in not shewing that the check was drawn on the order of the trustees, and in setting out a check void on its face, because drawn on a fund, over which the local superintendent had no control, and bad in not shewing that the sub-treasurer had money in his hands belonging to the school section, or that the county council had made provision to enable him to pay the amount. This disposes of the case, so that we need not allude to the other questions raised on these pleadings.

Judgment for defendant on demurrer.

HEYLAND V. SCOTT ET AL.

Second application—When allowable—Practice.

Defendants obtained a rule *nisi* in Practice Court to set aside a judgment in ejectment and *hab. fac. poss.* issued thereon, which was enlarged into Chambers and then into the full Court, the enlargements being obtained for the purpose of enabling defendants to file affidavits shewing the relief given them by the Court of Chancery against said judgment, on a contemplated application there. These affidavits it was agreed by plaintiff's counsel might be used in support of the rule already issued, though necessarily sworn subsequently to it; but notwithstanding this agreement, he afterwards insisted to defendants' counsel that the affidavits could not, either by the practice of the Court, or under the agreement, be used by defendants. Defendants thereupon moved a new rule in similar terms to the other, in order that the affidavits referred to might come before the Court, stating at the same time all the facts connected with the case, and the reasons for making the second application:

Held, on motion to set aside this rule, as vexatious, that it did not in its facts come within the class of decided cases in which a second application was held to be wrong, as neither the Court nor any Judge had disposed of the defendants' application up to the time of moving the second rule, and the facts of the case had all been mentioned on the motion for the same.

Held, also, that the statement made by defendant's counsel, on moving the second rule, as to the course he was taking and his reasons for taking it, in effect amounted to an abandonment of the original rule.

Semble, that the special application to set aside the rule was unnecessary, as the objection taken could have been urged on shewing cause to it.

Quære, whether the affidavits in question could, under the agreement referred to, have been read in support of the original rule.

In Michaelmas Term last *R. A. Harrison*, Q.C., obtained a rule to shew cause why a rule *nisi* issued in the cause

on the 21st November should not be set aside with costs, on the ground that it was a second application for the same cause and for the same relief, made whilst the first application was still pending, and was a vexatious application; or why the rule *nisi* issued in the cause on the 4th of June last, and enlarged into the full Court, should not be discharged with costs, on the grounds that the defendants, having made a second application to the Court for the same relief and on the same grounds as therein mentioned, must be taken to have abandoned and waived the first rule; or why the defendants should not be directed, before proceeding with the second rule, or allowed to take any benefit therefrom, to pay all the costs incurred in and about the opposing of the first rule; or why such other rule or order should not be made for the relief of the plaintiff in the matter of the two several applications as to the Court might seem meet.

This rule was issued on Monday, 25th November. On obtaining the rule plaintiff filed a copy of the rule *nisi* issued in the Practice Court, on 4th June last, to set aside the writ of possession and all subsequent proceedings, and to allow defendants to withdraw the confession of judgment given in the cause; to have the confession given up to be cancelled, and all proceedings on the confession and writ of possession stayed, until the title to the land sought to be recovered in the action should be tried, upon such terms as to the Court should seem fit, on the grounds that the defendants had a good defence to the action on the merits, and that the confession was given by the defendants under a mistake and in ignorance of the truth as to their defence to this action, as shewn in the affidavits and papers filed;* or why the defendants should not have leave to amend their notice of title in such manner as might be necessary to let in their defence, &c.

The rule *nisi* of the full Court of Michaelmas Term, obtained by defendants, was issued 21st November, 1867, and was the same as that issued in the Practice Court on

the 4th of June, down to the *; and was on the further ground that the Court of Chancery had released the defendants from the condition imposed by the said Court, that the defendants should give said confession, and upon all the grounds shewn in the affidavits and papers filed; and why defendants should not have leave to amend their notice of title to let in this defence.

There was also a rule of the Practice Court filed, dated 22nd November, 1867, by which it appeared that by the consent of counsel for both parties the rule of the 4th of June was enlarged into this Court.

During this term *R. G. Dalton* shewed cause and filed several affidavits; first, his own affidavit, in which he stated that the rule in the Practice Court was first enlarged into Chambers, and finally to the 4th day of Michaelmas Term, by the Chief Justice of Upper Canada; that the enlargements were sought and granted that there might be an opportunity to obtain the action of the Court of Chancery to release the defendants from the condition that they had entered into in that Court, to give the confessions of judgment in the cause; that since the last enlargement in Chambers the Court of Chancery had released defendants from the condition by an order filed in Court; that the Chief Justice, on the argument, contemplated the rule being enlarged into full Court, but by the endorsement on the back of the rule it only appeared to have been enlarged to the fourth day of the term; that on the argument before the Chief Justice a number of affidavits, relating to the possession of the land, concerning which the action was brought, sworn after the issuing of the rule, were put in, the counsel who argued the matter supposing he had a right to do so under the agreement between the attorneys in the cause, but after he left Chambers an objection was taken that, as the affidavits were sworn after the issuing of the rule, they could not be received; that on that agreement being read to the Chief Justice he received and read the affidavits; that he knew from information from plaintiff's attorney that he insisted

that defendants could not either by the practice of the Court or under the agreement referred to use affidavits, in support of the rule, sworn after it had issued, and that was one reason which induced defendants' counsel to move a new rule *nisi*, as he knew the object of enlarging the rule was that there might be an opportunity for the action of the Court of Chancery to be shewn (in one event which had happened) in support of the rule, and his belief that it was necessary that the affidavits as to the possession of the land should be produced; that before plaintiff's counsel, Mr. Harrison, appeared to shew cause in the Practice Court, he was informed that it was the wish of plaintiff's counsel that both rules should be submitted upon the argument to the full Court, but he preferred shewing cause, and after the defendants' counsel had stated his view to the Judge of the Practice Court, they came to the agreement, which was endorsed on that rule, for enlarging into this Court.

There was also read, on shewing cause, the affidavit of Mr. Barrett, having appended to it the agreement referred to in Mr. Dalton's affidavit. It was dated 15th June, 1867, and entitled "In Chancery, *Scott v. Heyland*," and under it they consented that all affidavits made on the pending motion in that suit, or in the action of ejectment of "*Heyland v. Scott*," might be read both in that suit and in the action at law, and that the parties making affidavits in the common law action might be cross-examined on the same, in the same manner as they would be had the affidavits been made in that suit, saving all just exceptions. The agreement was signed by McLennan and Henderson for the plaintiffs. His object in obtaining the consent was to enable all parties to use in the Chancery suit all affidavits made as well as in the said suit as in this action. The defendants costs of the suit in Chancery had been taxed at £47 4s. 10d. and paid. The costs of obtaining the order relieving the defendants from the undertaking to confess judgment, given on obtaining the injunction staying proceedings at law, were made up at about £77 and were partly taxed, but the taxation had not been completed;

but he believed when the amount was ascertained they would be paid, and he (Barrett) had offered to give the undertaking of Hugh Richardson, Esq., of Woodstock, his principal, to pay the costs when taxed, but the offer had not been accepted.

The original rule of the Practice Court, with the enlargements on it, was also filed.

Dalton shewed cause :—The rule of Hilary Term, 3 Jac. 1, which is the basis of the decisions of the Courts, that they will not permit a second application to be made in the same matter, when the first was discharged for insufficient materials, does not apply when there is still a rule pending. The words of the rule are, “If a cause be moved in Court in the presence of counsel of both parties, and *the Court shall thereupon make an order*, no person shall afterwards cause the same to be moved *contrary to such rule or order*.” Here no motion is made contrary to the order of the Court; on the contrary, this application is really made to obtain that which the Judge before whom the matter was discussed seemed to be desirous of granting to the defendants.

The plaintiff’s counsel, consenting to enlarge the rule of the Practice Court into this Court, should not now be permitted to say that any order had really been made in the matter : *Chitty’s Arch. Pr.* (ed. of 1862) 1579, 1580.

This rule should be discharged in any event, for all the cases shew that the objections taken are good grounds to oppose the rule being made absolute, and should not be allowed in this form in any Court.

J. Patterson, contra :—This was a second application on more perfect materials to correct the defects in the first one, and that is contrary to the practice. In the *Queen v. Manchester and Leeds Railway Co.*, 8 A. & E. 413, it is stated that the rule of Practice, if not altogether universal and inflexible, was as nearly so as possible, that the Court will not allow a party to succeed on a second application, who has previously applied for the same thing without coming properly prepared. Lord Denman said, “I think

that a party is to come at first fully prepared with a proper case, and if he fails to do so, he must not afterwards renew the application with an amended case."

The first rule was pending when the second was moved, and the second ought not to have been granted: *Moodie v. Dougall*, 9 U. C. L. J. 238; *Pratt v. Dimes*, 10 U. C. L. J. 271; *Leggo v. Young*, 17 C. B. 549.

RICHARDS, C. J., delivered the judgment of the Court.

In *Tilt v. Dickson* (4 C. B. 736) the subject of a second application in the same matter, when the first one was decided against the party applying, was fully discussed, and many of the cases decided previously thereto referred to. I have looked at most, if not all, of these cases, and find that the objection in every instance was taken on opposing the second application, when there had been an express decision on the first one. *Leggo v. Young* (17 C. B. 549) is to the same effect. Jervis, C. J., there said, "With full knowledge of the facts and all the materials before you, you abstain from asking us then to amend, and now you seek to vex the defendant with a second application: it cannot be allowed."

I understand that the enlargements of the rule were made with a view of permitting an application to the Court of Chancery to release the defendants from the condition imposed on them to give the confession of judgment, which was then sought to be set aside. Of course the granting of the application by the Court of Chancery would be subsequent to the issuing of the rule in the Practice Court, and according to the practice of the Court that new matter could not properly be brought forward in support of the rule, unless by consent, for it would seem to involve the filing of additional affidavits.

In *Ransome v. The Eastern Counties Railway* (2 L. T. N. S. 237, C. P., S. C. 8 C. B. N. S. in note *a.* 709) a rule *nisi* had been moved on the last day of the preceeding term for an injunction, on the ground that the Company had given undue preference to certain parties over the

plaintiff. Plaintiff's counsel applied for leave to file additional affidavits, shewing that certain alterations made by the Company in their tariff were merely colorable, to defeat the purpose of the injunction. Erle, C. J., said, "This does not appear like new matter: it seems relevant to the rule which is pending. What the plaintiff wanted was to file an affidavit stating the facts." Erle, C. J., "My brother Willes suggests you should abandon your rule and come again for another on additional affidavits."

The plaintiff stated the facts did not come to his knowledge until after the rule *nisi* was granted. Erle, C. J.: "On consideration, I think we should be establishing a dangerous precedent were we to allow these affidavits to be filed. After a rule has been granted, it would be, I repeat it, a bad precedent to favour such an application." The plaintiff's counsel said, "Suppose we give defendants notice that we abandon this rule." Willes, J.: "That you have a right to do." Erle, C. J.: "By that course you will stop further costs from that moment. If you choose to abandon the rule, it must be on the ordinary terms, but the Court will assist you thus far, that the costs of the abandoned rule shall be suspended until the new rule has been disposed of." The rule was abandoned. In the report of this part of the case, in the note in 8 C. B. N. S., the concluding observations of Erle, C. J., are, "Perhaps, the better course will be to allow you to abandon the former rule and to come again upon the new materials for another rule: the costs of the abandoned rule to abide the event."

In *Mitchell v. Harding* (5 L. T. N. S., Q. B. 348) an application was made to inspect premises. A similar application had been made in Chambers to Keating, J., but had been refused. In opposition to the rule it was held that the application ought to have been by way of appeal from the decision of the Judge in Chambers, and the rule was discharged, but without costs. Subsequently a rule *nisi* was obtained, upon the production of an affidavit stating what the materials were which had been produced before the Judge at Chambers.

In *Brulwell v. Pim* (2 L. T. N. S. 361), after a rule to enter a nonsuit had been made absolute, no cause being shewn against it, on shewing circumstances that satisfied the Court that it was not from any fault of his that cause was not shewn to the rule, the Court permitted a rule to go to shew cause why the case should not be reopened, the costs occasioned by the interference of the Court to be paid, and the merits of the original rule to be argued, and form the point on which the decision would turn.

Looking then at the facts of this case, and the postponement and enlargement from the Practice Court, with the agreement filed as to the use of affidavits, I do not think this case in its facts is brought within any of the decided cases in which it has been held that the second application was wrong. Neither the Court nor any Judge in Chambers had disposed of the defendants' application up to the time of moving this rule, and the facts of the case were, I think, all mentioned by Mr. Dalton in moving the second rule, which was moved in the full Court. The proceedings resemble very much the course pursued and considered right in *Ransome v. The Railway*, and in disposing of the second application we gave the relief sought, on the terms of paying all the costs on the former applications.

The objections taken to this rule could have been stated in opposing the second rule, and this application therefore, in any event, seems to have been unnecessary.

The statement by the defendants' counsel, in moving the second rule, as to the course he was taking and his reasons for taking it, shewed, in effect, if he did not so state in words, the abandonment of the original rule. There was, therefore, no reason why the Court should not grant the relief they did on the second application, on the terms imposed; and as this application fails on the merits, as well as having been unnecessarily made, we think the rule should be discharged with costs.

Rule discharged, with costs.

WALSH V. BROWN.

Sale of "Greenbacks"—Condition precedent to delivery—Payment by promissory notes—Tender—Waiver after maturity without consideration—Evidence—Trover—Detinue—Conversion.

Defendant agreed to sell to plaintiff certain American currency or "Greenbacks" in four specific sums, amounting in all to \$27,000 of that currency, plaintiff giving him contemporaneously with each transaction his four promissory notes, payable at different times, and for different amounts, in Canadian currency, and also depositing with each of the first two notes, but not with the third, a certain sum of money of the latter currency; while with the fourth he deposited \$400 in American currency, as collateral security, to be returned to plaintiff on payment of that note. Defendant then delivered to plaintiff four of the usual broker's notes in this form, "Sold to * * *deliverable on payment of his note* due * * the sum of * * in American currency." After the maturity of the first note plaintiff went to defendant and asked if it was necessary to renew it, when defendant said not, as it drew interest; but after the remaining notes had fallen due defendant wrote to plaintiff stating that his notes being still unpaid he could not carry the amount of American currency longer and had therefore converted it at that day's rate of exchange, charging his account with the same. Subsequently to this plaintiff several times applied to defendant and his solicitors for the notes, tendering in payment a certain sum of money, which was short by some \$10 or more, and the cheque of one M.; but the solicitors refused to give up the notes, stating that they had been practically paid (by the conversion of the Greenbacks). It further appeared that plaintiff had drawn out of defendant's hands all his money but the \$400 deposit in Greenbacks. Plaintiff sued defendant on his agreement to deliver the American currency, alleging his readiness and willingness to pay the notes, but that defendant waived the payment on the days they became due, and that within a reasonable time afterwards and before action he tendered their amount to defendant, who refused to accept it:

Held, that the payment of the notes was a condition precedent to the delivery of the "Greenbacks," and that in the absence of any excuse or justification for the non-payment, plaintiff could not recover; that there was no evidence of plaintiff's readiness and willingness to pay according to the terms of the notes, or of sufficient waiver of payment, the alleged waiver at best only applying to one note, and that, merely as to time of payment, not the payment itself, and being after the maturity of the note, and without consideration.

Held, also, that the written memoranda and the circumstances of the case shewed that no American currency was collected and set apart for plaintiff under the agreements, so as to pass to him the property in certain known treasury notes or "Greenbacks," and give defendant a lien on them for the amount he was to receive, and that therefore *trover* and *detinue* would not lie for the "Greenbacks;" and that plaintiff could not recover back the deposit of \$400 in "Greenbacks," under the count for *trover*, as that had never been demanded, and there was no evidence of actual conversion of it.

Held, also, that *trover* and *detinue* would lie for the four promissory notes, the evidence shewing that they were demanded from defendant and his solicitors, who refused to give them up, though it appeared from defendant's own letter to plaintiff and his contention both at the trial and here that by the conversion of the American currency the notes had been in fact paid.

The first count of the declaration alleged that defendant was a broker in Toronto, and bought and sold exchange and treasury notes of the United States, and other money of the United States, called American currency, being in value below the standard of gold current in this Province; and that in consideration that plaintiff, at defendant's request, would pay defendant \$531.32 of Canada money, and deliver to defendant his promissory note for \$4,327.22, of lawful money of Canada, dated 17th September, 1866, payable to defendant or order one month after date, defendant sold to plaintiff \$7000 in American currency, in treasury notes and other current money of the United States, which defendant promised and agreed to deliver to plaintiff, on payment of the said promissory note, and plaintiff then paid defendant the money (\$531.32) and delivered him the note for \$4327.22, which defendant accepted and received on the said terms. *Averment*: plaintiff's readiness and willingness to perform his part of the agreement, of which defendant had notice, but defendant did not present the note for payment on the day it fell due, and defendant waived or dispensed with payment thereof on that day, and after the maturity of the note, within a reasonable time in that behalf, and before the commencement of this suit, plaintiff tendered the amount of the note and interest thereon, which defendant refused to accept; yet defendant did not nor would, on such offer and tender of payment, or at any time, although demanded, deliver to the plaintiff the said \$7000 in American currency aforesaid, but refused so to do.

The second count was on another agreement, that plaintiff was to give defendant \$172.20 of Canadian money, and a promissory note for \$3,300, at one month from 20th of September, 1866, in consideration whereof defendant sold plaintiff \$5000 of American money, which he agreed to deliver to plaintiff on payment of last mentioned note; that plaintiff paid defendant the Canadian money and gave him the note, which he accepted: *Averment and breach*, to same effect as in first count.

Third count was for sale of \$5,000 more, in American currency, for a note of \$3,448.20, payable one month after 3rd October, 1866, to be delivered to plaintiff on payment of the note: *Averment* and *breach* to same effect as in first count.

Fourth count similar to third, for note of \$6,797.41, dated 9th October, 1866, payable to defendant one month after date, and \$400 in the currency of the United States, as collateral security for the payment of note, and to be returned on such payment; that defendant sold plaintiff \$10,000 in American currency, to be delivered on payment of note. Same averment and breach as in previous counts.

Fifth count was in trover for the notes mentioned in the four previous counts, amounting to \$27,400 of such currency.

Sixth count was *detinue* for same thing as in fifth count.

Seventh count was for money received by defendant for use of plaintiff, interest, and account stated.

Plaintiff claimed under sixth count a return of the goods and chattels and their value, \$1,000 for the detention, and under the residue of the declaration \$25,000.

Pleas—To the first four Counts. 1. Denial of the bargain and sale to plaintiff of the several amounts or sums of American currency in the counts respectively mentioned, upon the terms therein alleged.

2. *Non-assumpsit*.

3. Denial of plaintiff's readiness and willingness to pay the same four notes, and of tender of payment thereof.

4. To fourth count, as to the \$400 in American money, readiness and willingness of plaintiff at and from time of maturity of said note, to re-deliver and return to plaintiff said \$400, but plaintiff never demanded same from defendant.

5. To fifth count, not guilty.

6. To sixth count, *non detinet*.

7. To common counts, never indebted.

8. Payment.

9. To first four counts, payment, and denial of waiver of payment.

The cause was tried before Morrison, J., at the Winter Assizes of 1867, for the County of York.

The plaintiff, as appeared from the evidence at the trial and the statement of the counsel on the argument, made the four agreements for the purchase of the American currency from the defendant, in the whole amounting to \$27,000, as follows:

	Date. 1866.	Amount in American C'y.	Amount of Note in Canadian C'y.	When Note payable.
1.	Sept. 17...	\$7,000.....	\$4,327 22.....	20th October.
2.	" 20...	5,000.....	3,300 00.....	23rd October.
3.	Oct. 3...	5,000.....	3,448 20.....	6th November.
4.	Oct. 10...	10,000.....	6,797 41.....	12th November.

The sold notes produced at the trial were all in effect the same. The first one was as follows:

"Sold to James Walsh, deliverable on payment of his note, due 20th October, 1866, the sum of seven thousand dollars in American currency.

Toronto, 17th Sept., 1866. (Signed) W. R. BROWN.

With each of the first two notes there was money deposited in addition to the amount of the notes, and with the third note there was no additional deposit. With the fourth note there were \$400 in American currency delivered, as collateral security, to be returned to plaintiff on payment of the fourth note.

At the trial plaintiff called a witness, who proved that in October, after the first note matured, plaintiff went to defendant's office and asked if it was necessary that the note should be renewed. Defendant said not, it drew interest. The witness called on defendant, at plaintiff's request, in the Fall, probably after the 27th November, and stated that plaintiff, then in New York, had made arrangements respecting the American currency, and defendant then informed him he had converted the "Greenbacks." After plaintiff returned from New York, in December, (he went there in November) witness went with plaintiff to defendant's office, when plaintiff desired a settlement and wanted his notes.

Defendant said it was too late, the notes were in the hands of his solicitors. On their referring to the solicitors they said there were none of the notes there. On returning to defendant he said he would not have anything to do with plaintiff, and on going again to the solicitors they said they had not the notes, and two or three days afterwards they went to defendant's office and told defendant witness had \$18,000 in his possession to pay the notes, and they demanded the notes. Defendant again said they were in the hands of his solicitors. Plaintiff told him he had gone to his solicitors and the notes could not be found. They again went to the solicitors, who refused to give up the notes, though the witness had the money to pay for them. On cross-examination he said, to the best of his opinion he went to defendant with plaintiff's telegraph, about three or four days after plaintiff arrived in New York. He stated to defendant that he had told plaintiff to settle with him before he went to New York. When he had the conversation with defendant about renewing the note only one note was then due. On the second occasion of going to defendant's office to pay the notes, witness had \$18,000 in money and a check of one Morse. He had the money and check in his hand when in defendant's office, and when in the solicitors' office. He insisted on paying the solicitors the amount of plaintiff's notes, who seemed unwilling to give up the notes. The solicitors said the notes had been paid practically. Plaintiff told witness he had drawn all the money to his credit from defendant's bank, except the \$400 in Greenbacks. He understood he had drawn out from defendant all the Canadian money placed to his account by defendant, all the money that had been paid to defendant.

The value of American currency, or Greenbacks, was proved to have been as follows, at the dates mentioned :

1866.

September 17th and 20th..... 69 cents to the dollar.

October 3rd..... about 67 $\frac{3}{4}$ " " "

October 20th	69	cents to the dollar.		
“ 23rd	68 $\frac{5}{8}$	“ “ “		
November 6th	67 $\frac{3}{8}$	“ “ “		
“ 12th.	70	“ “ “		
“ 27th	70 $\frac{3}{4}$	“ “ “		
December 6th.....	71 $\frac{1}{2}$	“ “ “		

On 27th of November gold went up 2 $\frac{3}{4}$ per cent, which reduced the value of Greenbacks. On 6th December gold was 139 $\frac{1}{4}$. On 27th November Greenbacks were worth 69 $\frac{3}{4}$: average on that day 70 $\frac{1}{2}$.

On the 27th November defendant wrote to plaintiff that his notes against American currency (amounting in the aggregate to \$17,872.83, due as before mentioned) having been held by him up to date upon a market declining to 137 $\frac{1}{4}$, and then rapidly advancing to \$144, he must notify him he could not carry the amount any longer, and he had therefore converted the same at that day's rate, of 69 cents to the dollar, charging his account with same.

At the close of plaintiff's case defendant's counsel submitted that plaintiff should be nonsuited, on the grounds that there was no proof of the payment of the notes, which was a condition precedent to plaintiff's right to demand the American currency, and no evidence of waiver; that as to tender, no proper proof of tender, nor of a sufficient amount, or within a reasonable time; and that there was no evidence to sustain either the count in trover or *detinue*.

The learned Judge ruled that the plaintiff had not made out a case to recover on the contract counts, nor under the count for *detinue* or trover; and that the tender, if sufficient, was not perfect.

In deference to the Judge's view plaintiff accepted a nonsuit.

In Easter Term last *Robert A. Harrison* obtained a rule *nisi* to set aside the nonsuit, and for a new trial, for misdirection, in ruling there was no case to submit to the jury on any of the counts of plaintiff's declaration.

The rule was enlarged until Michaelmas Term last, when *Thomas Moss* shewed cause: As to trover for the notes, a tender cannot be shewn so as to create property in plaintiff in the notes given by him. The notes until paid were the property of defendant: when paid they became the property of plaintiff: *Alexander v. Strong*, 9 M. & W. 733; *Poole v. Tumbidge*, 2 M. & W. 223.

Time was of the essence of this contract.—*Harper v. Rawlings*, 4 Bing. 280; *Hipwell v. Knight*, 1 Y. & Coll. 401.

The waiver of the payment of the notes cannot be by parol, as it varies the time the Greenbacks are to be delivered, in fact making a new contract, and this cannot be done except in writing, under the Statute of Frauds: *Stead v. Dawber*, 10 A. & E. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Noble v. Ward*, L. R. 1 Ex. 117.

Parol evidence is inadmissible to vary the contract. The averment of readiness and willingness to pay is directly traversed, and the evidence shews he was not ready and willing to pay, but asked to renew.

If the tender was regular in other respects, which it was not, the amount tendered did not cover the face of the notes and the interest: on the 18th December the notes and interest amounted to \$18,010 and some cents. As the refusal of the tender was general, the defendant was not bound to say why, or he might state his objection. Mr. Morse's check was not a legal tender.

If the Greenbacks had been converted the day the notes became due, it would have been more profitable to the defendant.

There was no demand of Greenbacks from defendant at any time.

Robert A. Harrison, Q. C., contra:—The American currency or Greenback was the subject of sale, and the plaintiff having purchased them had a right to have them delivered according to the contract. This could not be considered as stockjobbing, for these Acts in England do not apply to dealing in foreign stocks.

Defendant led the plaintiff to believe it was not necessary to pay the notes at maturity, and it must be presumed that defendant had the Greenbacks ready to be delivered to plaintiff under the agreements, or how otherwise could he convert them, as he says he did, in his letter of 27th November?

The tender proved is sufficient. It was not objected to because it was not in specie, but because they were not willing to take the money and give up the notes.

If we assume that the defendant was possessed of the Greenbacks when the agreements were made, and that they were merely held by defendant for plaintiff under the agreement, the property in them would be in plaintiff, with a lien for the amount of the notes by defendant. Then, on a tender of the amount of the notes and a refusal to deliver, there was a conversion, for which plaintiff can recover, and plaintiff is entitled to recover the full value of the Greenbacks: *Dunlop et al. v. Grote et al.*, 2 C. & K. 153; *Bloxam v. Sanders*, 4 B. & C. 948, per *Bayley, J.*; *Norman v. Read*, 10 Ir. C. L. R. 207; *Tarling v. Baxter*, 6 B. & C. 360.

If the property in the American currency did not pass to the plaintiff, then the defendant failed to perform his agreement, and plaintiff ought to recover in that view. Then there was a waiver of the payment of the notes, or some of them, and this waiver did not require to be in writing, the note or scrip not being within the Statute of Frauds: B. & L. Pr. 2 ed. 568, and authorities there referred to.

If the \$400 in American currency be considered as money, defendant has not returned that, and plaintiff may recover as for money. If not considered money, trover will lie for the same.

RICHARDS, C. J., delivered the judgment of the Court.

The written memoranda put in indicate that the American currency was to be delivered on certain days, and in the absence of any evidence to the contrary, it seems reasonable to suppose that the seller was to have the whole

period named in each agreement to procure the amount sold. The keeping such large sums on hand, without any ostensible reason or necessity for so doing, would occasion a large and useless outlay of money. I think we may assume from the circumstances of the case that no American currency was collected and set apart for the plaintiff under the agreements, so as to pass the property in certain known Treasury notes, or other *indicia* of American currency, to the plaintiff, and giving defendant a lien on them for the amount he was to receive.

In *Hazeltine v. Siggers* (1 Ex. 856), an action in relation to the sale of certain foreign stock, to wit, £28,000 active Spanish stock, Baron Parke said, "A sale in such a case as this means only a contract for sale, for the contract will be performed by the delivery of any goods of this description. There is a distinction between a contract to sell, or for the sale of articles of this description, and contracts for a specific chattel, as to which a bargain has been made and where the property may pass without any reference to any delivery at all. Where there is a contract to sell particular and specific stock or bills, from the very nature of the thing it is a contract not for an actual sale but a contract to deliver." In argument he said, "Does not the nature of the contract shew that the words 'bought and sold' cannot be construed in the strict sense in which they are used with reference to goods and chattels. Instead of being a contract for the sale of a specific chattel, it is a contract for the sale of bonds, which are transferable by delivery and payable to bearer. Suppose a contract for the sale of Exchequer bills, would it be necessary to prove, upon such a declaration as this, certain specific bills, by the delivery of which alone the contract would be satisfied"?

The head line in the case says such a contract is not within the 17th section of the Statute of Frauds.

Pawle v. Green (4 Bing. N. C. 445) also discusses the question of a sale of Spanish bonds being within the 17th section of the Statute. *Humble v. Mitchell* (11 A. & E.

205) is authority that a sale of shares in a joint stock company is not within the Statute.

Knight v. Barber (16 M. & W. 66) shews that a sale of railway scrip is not the sale of "goods, wares or merchandize." Pollock, C. B. : "The sale of scrip is nothing more than an agreement for the transfer of the interest which the party thereafter may possess in the capital of the company, and that interest does not come within this description of goods, wares or merchandize."

Parke, Baron, said, "The exemption in the Stamp Act, as to goods, wares and merchandize, was intended to protect *bond fide* mercantile transactions of the sale and purchase of goods ; but this is a mere agreement between one speculator and another, whereby the party acquires a right to the allotment of certain shares."

In this view, I think, therefore, that the counts for *trover* and *detinue* cannot be sustained for the twenty-seven thousand dollars of American currency, the subject of the four sale notes from the defendant to the plaintiff.

As to these, the case turns upon the agreements themselves. The payment of the note given for each purchase is by each memorandum made a condition precedent to the delivery of the American currency mentioned in it. In the absence, therefore, of any excuse or justification for the non-payment of the money specified in each of the sold notes at the time therein mentioned, the plaintiff must fail to recover on the agreements. The failure to perform the condition precedent as to each would be a sufficient answer to prevent a recovery in this action on the agreement.

The plaintiff alleges in each of the counts of the declaration that the defendant waived and dispensed with the payment of each of the said notes on the day it became due, and afterwards and within a reasonable time in that behalf, and before the commencement of the action, the plaintiff tendered the amount of such note to the defendant who refused to accept it.

The evidence of the witness Nixon, as to the waiver, as taken down by the learned Judge at the trial, reads

thus : "After the first note matured I was in defendant's office with plaintiff, when plaintiff asked if it was necessary that the note should be renewed. This was in October, 1866. Defendant said not, as it drew interest." The first note for \$4327.22 matured on the 20th October. It was the only note then due.

This, as evidence of waiver, is very meagre, and at best can only apply to the first note.

The general rule of law is that a simple contract may before breach be waived or discharged without deed and without consideration, but after breach there can be no discharge except by deed, or upon sufficient consideration. To this rule it is said that contracts on bills, which are regulated by the custom of merchants, form an exception, and that the liability of the acceptor, though complete, may be discharged by an express reservation of his claim on the part of the holder. Nothing short of an express discharge will do. If the renunciation be not express and for the whole amount, there must be a consideration : *Byles* on Bills, 5th ed. 144 ; *Chitty* on Bills, 10th ed. 207 ; *Dingwall v. Dunster* (Doug. 247) ; *Steele v. Harmer* (15 L. J. Ex. 217, S. C. 14 M. & W. 136) ; *Foster v. Dowber* (6 Ex. 851, and notes to American edition). But, in the case before us, the alleged waiver is merely of the time of payment of a promissory note, not of the payment of the note itself, and is after the note became due and not before, and is without consideration.

I have not met with any case which goes the length of holding that the payee of a note, by agreeing, after the note became due, by parol and without consideration, to extend the time for payment, is bound by such agreement. I do not see that there was any consideration for extending the period of payment. If that was agreed to be done, nothing new was given for so doing. It may be urged there was an agreement to pay interest during the period that the note was unpaid, but the law would give that, in the nature of damages, so that no legal or sufficient consideration can be considered as given for the agreement to extend the time.

The evidence, I think, fails to establish the plaintiff's readiness and willingness to pay according to the terms of the notes; or that defendant waived or dispensed with the payment thereof on that day. There is nothing to shew that he offered to pay before the day the note, due in October, became payable, or that he was ready and willing to do so, or that before that day defendant waived or dispensed with the payment on the day. All that was said in effect was that it was not necessary that the note should be renewed, as it bore interest, and this was said after the note was "past due." If there could be a waiver of present payment, and a postponement of the same to a future day by parol without consideration, it seems to me it ought to be done in a more distinct and satisfactory manner than it was in this case. To what time was the payment postponed? For how long a period was the defendant by this supposed agreement to be bound to deliver the plaintiff the amount of American currency mentioned in the sale note? The doctrine of the drawer and endorser being discharged, by time being given to the acceptor of a bill, is well established by numerous cases. It is laid down by Best, C. J., in *Philpot v. Briant* (4 Bing. 717) in language which seems to me to apply to this case: "The time of payment must be given by a contract that is binding on the holder of the bill: a contract without consideration is not binding on him: the delay in suing is, under such a contract, gratuitous: notwithstanding such contract he may proceed against the acceptor when he pleases, or recover the amount of the bill from the drawer and endorsers. As the drawer and endorsers are not prevented from taking up the bill by such delay, their liability is not discharged by it: to hold them discharged under such circumstances, would be to absolve them from their engagements, without any reason for so doing." He then refers to the case of the *Factors of the Arundel Bank v. Goble*, found in a note to *Chitty on Bills*, also in vol. ii. of *Chitty's Reports*, and continues: "The acceptors applied to the holders for indulgence for some months. They, in

reply, wrote to the acceptor informing him that they would give him the time that he required, but that they would expect interest. On a motion for a new trial the Court of King's Bench held, that as no fresh security was taken from the acceptor, the agreement of the plaintiffs to wait was without consideration and did not discharge the drawer. This is a stronger case than the present. In our case there is no agreement for any particular time, nor any consideration for giving the time that was given to the acceptor."

On the whole, I think the plaintiff's case fails as to the agreement to deliver the American currency, the notes not having been paid according to the terms mentioned in the several agreements, their payment being conditions precedent to the delivery of the "currency" bargained for.

As to the \$400 in American currency, deposited with the note mentioned in the fourth count of the declaration, as collateral security, as that has never been demanded, plaintiff cannot recover that back, and there is no evidence of actual conversion of it.

As to the \$27,000 of American currency agreed to be delivered to the plaintiff under the four agreements set out in the declaration, trover will not lie for them, as plaintiff, in the view we take of the law, never had any property in them.

The only remaining question is, as to the four promissory notes produced by the defendant at the trial. I think there is evidence that they were demanded from defendant; that he referred plaintiff to his solicitors, and they refused to give them up.

The ground taken by defendant himself in his letter of the 27th November, and contended for at the trial and on the argument, is, that by the conversion of the American currency, which he had intended to deliver to the plaintiff, on payment of the notes, he had received payment—that the notes were in fact paid, and that he (the defendant) had paid over to the plaintiff the balance of his account after charging him with the four notes, thereby in fact receiving payment for them.

There can be no doubt that a party paying a note is entitled to the possession of it. The doctrine on the subject is laid down by Lord Tenterden in *Hansard v. Robinson* (7 B. & C. 94). In speaking as to the right of a plaintiff to sue on a lost bill, and of the custom of merchants in relation to rights of parties paying bills, he said: "What then is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer. * * It is his own security, his voucher, and his discharge towards the drawer." In *Cornes v. Taylor* (10 Ex.) Pollock, C. B., said, "A party to a bill of exchange, who has paid it, has a right to have the bill given up to him in order to guard against its being again put in circulation."

If the learned Judge, on being applied to, says that his attention was drawn to the question of the right of plaintiff to recover, under the trover and detinue counts, his promissory notes, they having been in fact paid, then it seems to me the nonsuit must be set aside and a new trial granted without costs; otherwise, if the ruling and argument at the trial only extended to the Greenbacks or American currency.

Rule absolute for new trial, without costs.

HOPKINS V. PROVINCIAL INSURANCE COMPANY.

Insurance—Misrepresentation—"Owner," meaning of—Misdirection—Rejection of evidence—New trial.

One of the conditions of a fire policy was that the application, with the survey and diagram of the premises, should form part of the insurance contract; and there was a proviso, in the shape of a covenant on the part of the assured, that the representation given in the application contained a just, full and true exposition of all facts, &c., *and the interest of the insured therein, so far as same were known to the assured*, and that if any material fact should not be fairly represented the policy should be void.

In the application plaintiff described the subject of insurance as "all the property of the assured," and to one of the enquiries therein contained, whether he was owner, mortgagee or lessee, he replied "owner." The property in question consisted of two buildings belonging to plaintiff, though, it appeared that the land on which they stood was *leasehold*. Defendants, among other pleas, in effect pleaded that plaintiff in his application had misrepresented the facts connected with the property, and especially as regarded his title thereto, having described himself as owner, whereas he was merely lessee.

At the trial plaintiff tendered the evidence of the owner of an adjoining building, to shew that he (witness) had told defendants' agent how the buildings were situated, and that the agent knew the position of all to be the same; but this evidence was rejected, as contradicting plaintiff's own written statement, and the jury were directed to find for defendants on the above plea, the learned Judge refusing to leave to them the question of misrepresentation on plaintiff's part:

Held, that this direction was wrong; that the word "owner," having no definite meaning in law, but being applicable to various interests which parties have in buildings, if plaintiff used it in good faith he ought not to suffer, and the question whether he fairly represented the facts regarding the risk should have been left to the jury.

Held, also, that in order fairly to judge of the answers of plaintiff, evidence might be given of the surrounding facts as to the ownership of the building and of the land; and that, to establish the *bona fides* of plaintiff's answer, he might shew that defendants' agent, who drew up his statement, had been informed by plaintiff, or some one else to plaintiff's knowledge, of the state of the title to the premises. A new trial was, therefore, granted without costs.

This was an action on a policy of insurance issued by defendants to plaintiff, covering two brick buildings occupied as stores.

Plaintiffs claimed as for a total loss.

There was a second count in the declaration on the account stated.

Defendants pleaded, among other pleas, as a fifth plea, that the representations given in plaintiff's application for

insurance did not contain a just, full, or true exposition of all the facts or circumstances in regard to the risk, condition, situation or value of the said property or of the interest of plaintiff therein, so far as known to plaintiff, and material facts regarding same and the risk were not then fairly represented to defendants; that by his application plaintiff represented that the insured property and the land and premises, on which such building was erected, were the property of plaintiff, when they were not his property; that plaintiff represented that he was the owner of such land and buildings, by stating in the proposal that same were occupied by two tenants of his, when he was not the owner; and that, in answer to the fourteenth question in the proposal, requiring plaintiff to state fully his interest in the insured property, whether owner, mortgagee or lessee, plaintiff therein represented himself as owner, whereas he was at most lessee, if he had any interest at all.

There was also a sixth plea, to the effect that under the policy fraud or false swearing on the part of the assured as to his interest in the property was to vitiate the same, with an averment that there had been such fraud and false swearing on plaintiff's part

The cause was tried at the last Spring Assizes for the County of Peterborough.

Plaintiff put in and proved the original policy and renewal thereof.

It appeared that on 1st May, 1855, one Dixon leased to plaintiff part of town lot No. 1, north of Simcoe Street and west of George Street, in the Town of Peterborough," being 16 feet on George Street and 100 feet deep, with a right of way in rear, for six years from date, at a certain rent, and plaintiff covenanted to remove from the piece of land all erections and buildings of any kind. There were then three other leases, executed at the same time, of adjoining premises. Plaintiff subsequently purchased at Sheriff's sale the building and lease next to his lot, as described in the lease to him, under an execution against the lessee thereof.

Evidence was tendered to prove that the witness, who

owned one of the four buildings in the block, explained to Walton, defendant's agent, the position of the buildings as to the title, and that he perfectly understood how they stood.

Defendants' counsel objected to the evidence being received against the plaintiff's own written representation, on which it was rejected.

Defendants then put in plaintiff's application, addressed to defendants, for an insurance to the amount of \$600 on two brick stores situate on the west side of George street, in the Town of Peterborough, "*all the property of the assured.*"

Under the head of, "Queries, to be answered by the Applicant," were the following, with the answers thereto:—

"For what purpose is the building used?" "Stores."

"How many tenants?" "Two."

14. "State fully the applicant's interest in the property insured; whether owner, mortgagee or lessee, and whether encumbered. If encumbered, state nature and amount of encumbrance, and value of whole property, including land and buildings; also, what insurance has been effected by mortgage, if application be made by the owner of the property, or by owner, if application be made by mortgagee?" The answer was, "Owner; no incumbrance."

Lastly, it was expressly agreed on the part of the applicant, that the application and survey, as well as the diagram of the premises therewith, was to form part and be a condition of the insurance contract.

In the policy itself there was a *proviso* that the assured covenanted and engaged that the representation given in the application for the assurance contained a just, full and true exposition of all the facts and circumstances in regard to the risk and the condition, situation and value of the property insured, *and the interest of the insured therein*, so far as the *same were known to the assured*, and that if any *material fact or circumstance* should not be *fairly represented*, the policy should cease and be of no further effect. It was also provided by the policy that it was made and accepted in reference to the conditions thereto annexed, which were to be used and resorted to, in order to explain

the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for.

The thirteenth condition of insurance indorsed on the policy was as follows: "When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy, and a warranty on the part of the assured."

Counsel for defendants contended that in consequence of the misrepresentation as to plaintiff's interest in the property being that of "owner unincumbered," and that the buildings were the property of the assured, when in fact he was merely lessee of the land on which the buildings stood, and consequently could not be the owner within the meaning of the statements made by plaintiff in his proposal, the policy was void and plaintiff could not recover.

Plaintiff's counsel insisted he had a right to take the opinion of the jury on the question of misrepresentation. He declined taking a nonsuit, and claimed the right to address the jury on the question. The Judge refused to permit him to address the jury, and directed the jury to find for defendants on the fifth plea.

Plaintiff's counsel contended he had a right to recover back the premium. On this the Judge ruled against him, and he then desired to add the common money count to recover back the premium, after the Judge had charged the jury, but the Judge refused the application.

In Easter Term last *Hector Cameron*, for plaintiff, obtained a rule *nisi* for a new trial, on the ground of misdirection in ruling that plaintiff could not recover, and that the fifth plea was proven, whereas the jury should have been allowed to find on the issue; and for rejection of evidence to prove that there was no misrepresentation, as alleged in the plea, and of the knowledge of defendants, through their agent, as to the nature of plaintiff's title to the property insured; for misdirection in ruling that plaintiff could not recover back in this suit the premium paid,

if the insurance was void *ab initio*, and in refusing to allow the amendment of the common counts, by adding thereto the counts for money paid and money had and received; and on the ground that the evidence of Walton, the agent, through whom the policy was effected, which was material and necessary for the plaintiff, could not be obtained at the last trial, as disclosed in the affidavit filed,

Plaintiff in his affidavit stated that before the insurance was effected he particularly explained to defendants' agent, Walton, the terms and conditions under which he held the property, on which the buildings insured were erected, and the manner in which they were situated as to risk, &c., and the mode of construction, and his right to remove the same; that Walton, after he so informed him, urged him to insure the building with defendants' Company; that he told Walton he would think over the matter; and that a few days afterwards Walton called him across the street, said he had made out the application, wanted him to sign it, and shewed the application he had filled up; that he signed it at Walton's request, supposing it had been filled up according to the information which he had given, and that that application, filled up in Walton's handwriting, was the one produced at the trial by defendant.

The rule was enlarged until Michaelmas Term last, when *J. H. Cameron*, Q. C., shewed cause (filing the affidavit of defendant's manager, denying any knowledge of the situation of plaintiff's premises, except what was obtained from the proposal itself, and stating if the true interest of the defendant in the premises, and the terms on which he held them, had been made known, defendant would not have taken the risk :—

The misrepresentation as to plaintiff's interest in the premises constitutes a legal fraud and avoids the policy. There was nothing to leave to the jury: the plaintiff had stated that he was the owner of the houses. There was no condition or explanation annexed to the statement: it implied that he was the owner in fee. The evidence clearly established that he was at best an overholding tenant at

the time the insurance was effected, probably with his lease renewed for two years. It could never be supposed for a moment that, with correct information as to the title and value of the property, any company would have taken the risk. The fact that one of the buildings, similar to plaintiff's, was sold for \$200 and subsequently for about \$120, plainly shews that the Company were by the want of correct information induced to take a much larger risk on the buildings than they otherwise would have taken. Upon every principle of law the policy ought to be declared void: *Walroth v. St. L. County Mut. Ins. Co.*, 10 U.C. 525; *Shaw v. St. L. Cty. Mut. Ins. Co.*, 11 U. C. 73; *Kuntz v. N. D. Ins. Co.*, 16 C. P. 131, 573.

The representation of the plaintiff's interest in the premises was a warranty, and if false in fact plaintiff can not recover.

W. H. Burns, on the same side :—There was no count in the declaration on which to recover back the premium.

The affidavits filed in reply clearly shew that if the true state of the case had been made known, defendants would not have taken the risk, and that it would be a gross injustice to defendants to hold them to this loss, when plaintiff had no substantial interest to be covered by the insurance.

He referred to *Holden v. Ballantyne*, 6 Jur. N. S. 451; *Bradworth v. Foshaw*, 10 W. R. 760; *Lampkin v. Western Ins. Co.*, 13 U. C. 241; *Henry v. Ag. Ins. Co.*, 11 Grant 125.

Hector Cameron, contra :—The plaintiff had an insurable interest in the houses, though he did not own the land. The questions are so framed that they only point to the fact of who is the owner of the *thing* to be insured, not asking if the proposer owns the fee simple of the land on which the buildings are situate. The plaintiff, therefore, properly and truly replied he was the owner of the building. The person who drew up the proposal knew exactly how these tenements were situated, and the answers shew the view he took of the questions. It is certainly unjust towards plaintiff, who effected the insurance in good faith,

and has paid his premium for renewing the policy for *five* years, that he should now be met by the strictly technical objection set up. The parol evidence rejected would satisfy any reasonable person that defendants' agent really knew all about plaintiff's title to the premises when he took the risk.

The evidence of the witness ought not to have been rejected. The charge against plaintiff is fraud, and the facts proposed to be given in evidence would shew that plaintiff could not have intended any fraud. The error was one committed by defendants' agent, and plaintiff would naturally suppose a proposal made out by the Company's agent, who knew all the facts, right, and it cannot be truly charged against him that any material fact had *not* been fairly represented so as to avoid his policy.

He cited *Laurent v. Chatham Fire Ins. Co.*, 1 Hall 41; *Fletcher v. Commonwealth Ins. Co.*, 18 Pickering 419; *Bank of Montreal v. Reynolds*, 24 U. C. 381, as to amending the declaration.

RICHARDS, C.J.—There is no doubt a material distinction between representations made to an Insurance Company of the condition of the premises at the time the policy is granted and representations that may be considered as expressing the intentions of the parties that the premises, during the whole period the policy is in force, will continue in the same condition as they are when the insurance is applied for. If there be a misdescription of the risk at the time the policy is granted, and such description is made a part of the policy, which provides that if any *material fact* or circumstance shall not be *fairly* represented, the policy shall be void, then it seems to me, whether in a life, fire, or marine policy, the insurance is void, if the misrepresentation consists in omitting a statement of a fact which ought in fairness to be stated according to the reasonable requirements made on the applicant. Even if such misrepresentation by the assured or his agent were made innocently, through inadvertence, mistake, or negligence, without any fraudulent intention

whatever, it will vitiate the policy and discharge the assured, as much as if there had been an actual fraud; with this difference, that in all cases where an actual fraud has been committed by the assured or his agent, the underwriter is allowed to retain the premium; but when the misrepresentation arises from a mistake, he cannot do so: *Williams Saunders*, III. 200 c. Note. The same note refers to the distinction between a representation and a warranty, the former of which is to be substantially performed, though if false in a material part it will avoid the policy, whilst the latter must be strictly and literally performed, and the very meaning of it is that it precludes all enquiries into the materiality or substantial performance of it. I apprehend that statements of facts material to be known, made on applying for a fire policy, are more in the nature of warranties than representations under policies like the present, when the party applying "covenants and engages, amongst other things, that his application contains a full, just, and true exposition of his interest in the property insured, so far as the same are known to him." It is not pretended that he did not know that he had only a leasehold interest in the land on which the houses, proposed to be insured, were situated; but it is asked, did he know that was the kind of interest the Company wished exposed?

The question, then, is reduced simply to the consideration whether this representation signed by him does state his interest therein truly and fairly. After referring to the buildings and diagram, he states "all the property of the insured." When asked to state his interest in the property insured, whether owner, mortgagee, or lessee, and whether encumbered, the answer is "owner; no encumbrance." The argument in his favor is, that being the owner of the buildings, in the sense of lessee of the land, he considered the question only referred to whether he desired to insure in his capacity as owner of the buildings, and as he mentions in another part of the proposal that he has let the buildings, he intended to inform the

Company he owned them and was not the lessee of them.

No doubt, as a general rule, when a man asserts that he is owner of a house, it will be assumed he means to declare he owns the land on which it stands. The general doctrine, that whatever is annexed to the soil becomes part of the soil, would properly apply in such cases. If this plaintiff had agreed to sell these houses to a stranger for a certain sum of money, I fancy a mere transfer of his right to the buildings would not be complying with his agreement, unless it could be shewn that the purchaser was aware that he was only the lessee of the land on which they stood.

It is laid down in *Sheppard's Touchstone*, 94, "By the grant of a messuage, or a messuage with the appurtenances, doth pass no more than the dwelling house, barn, &c., and buildings adjoining, orchard, garden, and curtilage, and the close on which the dwelling house is built; *and so much also may pass by the grant of a house.*"

"By the grant of a cottage doth pass a little dwelling house that hath no land belonging to it, and may extend to a curtilage, and implies a court and backside. It may also comprise a garden."

A general agreement to sell a property means a sale in fee simple. The Court will not infer that a term of years only is sold on account of the smallness of the price: *Hughes v. Parker* (8 M. & W. 244). The words of the instrument relating to the sale there under discussion were, "I agree to sell the house and fixtures, No. 163, Pickadilly, to commence from 1st January next, for £60. J. Parker." Alderson, Baron, said: "There is in truth on the face of it an agreement for the sale of the fee simple."

The application for insurance, though purporting to be put forth by the insured, as the basis on which the insurance is to be effected, must be considered as the notice by the Company to intending assurers of the information they wish communicated to them, and in all fairness should contain such clear intimations of information as would enable the signer of the application to give it, without any hesitation or doubt as to what was intended.

After getting the application we may suppose the applicant would read it over.

Below the portion of the application, and under the head lines, "Queries to be answered by the Applicant," we find the following:—

1. Building—Is it stone or brick?

How many stories high?

2. Walls?

3. Roof?

4. Gutters?

5. Stoves?

6. Pipe?

7. Ashes?

8. For what purpose is the building used?

How many tenants?

9. Distance from other buildings?

10. State any other and what insurance is effected on the property now to be insured, and with what Companies.

11. If a building assured, state its estimated present value.

12. If stock-in-trade, state estimated value of average stock.

13. Is camphene or burning fluid used on the premises: if so, which?

14. State fully the applicant's interest in the property insured; whether *owner*, mortgagee or *lessee*, and whether encumbered. If incumbered, state nature and amount of encumbrance and *value* of whole property, *including lands and buildings*; also, what insurance has been effected by mortgagee, if application be made by owner of property; or by owner, if application be made by mortgagee.

The answers are to be written opposite these questions. There are minute enquiries under each head of the first seven questions upon which nothing turns. After looking this over, the last thing he has read at the bottom of the last question is as to his interest in the property, whether owner, mortgagee or lessee? The question points to his

interest in the property proposed to be insured, and in ordinary every-day language used by himself he says, in effect, "I am owner of the buildings, I am neither mortgagee nor lessee of them. They are not encumbered." He then writes down in the application that the insurance is desired "On two brick houses, marked Nos. 1 and 2 on the diagram, *all the property of the insured.*" Does he mean anything more than that he owns these houses as houses?

Then, in reply to the eighth question, considering himself the owner, he says that the buildings are used for stores and there are two *tenants*. He is truly then their landlord.

In reply to the fourteenth and last question he says, "owner unencumbered," and he then finds that if the property is encumbered, he is to give the nature of the encumbrance, and the value of the whole property, including *land* and *buildings*.

If the question had been, "If the building insured be situated on leased lands, state the value of the buildings, by whom owned and their value, and who is the owner of the land on which they are situated, and the nature of the lease granted by the owner of the land, and full particulars thereof"; when put in this way the party applying for insurance would have full notice of the information required from him, and ought in fairness to give it. But when questions are put in such a way that he may be misled as to what information is desired of him, it seems unjust that he should lose his insurance, if he has acted in good faith in what he has done, has honestly given what he believed was sought of him, and has really been led into the difficulty by the carelessness of the Company itself in framing the questions which they desired him to answer.

The authorities referred to by my brother A. Wilson shew that the term *owner*, the one used by the defendants in their printed applications, is one which has no definite legal meaning, but may be applied to various interests which parties have in buildings, and in that way is an equivocal term. If plaintiff used it in good faith in

describing his interest in the buildings, he ought not to suffer, and the question of whether he fairly represented the facts regarding the risk should be left to the jury.

The proviso in the policy is to the effect that plaintiff covenants and agrees that the representation given in the application of insurance contains a just statement of the interest of the insured in the property insured, so far as the same may be known to the insured, and if any material fact or circumstance shall not have been fairly represented the policy shall be void.

What was meant by the defendants by the term "owner?" Or rather, in what sense would a layman, about to effect an insurance with the Company, in reading the application, consider the Company intended to use the term "owner" in relation to such insurance? If as simply *owner* of the building, though only lessee of the land, then plaintiff ought not to be turned out of Court on this ground. This seems to be the view expressed by Cockburn, C. J., in *Fowkes v. Assurance Association* (3 Best and Smith 925). That case was as to the fair interpretation of language used in a declaration, taken as the basis of a contract for life insurance. The principle involved in that case and this, on the point under discussion, seems to me to be identical. He observed, "In construing an instrument prepared by the Company and submitted by them to the party effecting the insurance for his signature, it ought to be read most strongly *contra proferentes*." Blackburn, J., in his judgment in the same case, said: "There are rules of construction which, though they may be cited on both sides, furnish several principles for our guidance, and one of those rules is, that in all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other. If there is any ambiguous phrase, another rule of construction, which was also known to the civil law, applies, *verba chartarum fortius accipiuntur contra proferentem*; and if the party who proffers an instrument uses ambiguous words, in the hope that the other side will

understand them in a particular sense, and that the Court which has to construe the instrument will give them a different sense, the above rules apply, and they ought to be construed in that sense which a prudent and reasonable man on the other side would understand them."

The policy states that the plaintiff engages that the representation given in the application for the insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the risk and the condition, situation, and value of the property insured, and the interest of the insured therein, so far as the same are known to the assured. If it had stopped here, it might have been contended that this was a declaration and warranty that the particulars were true. It then proceeds, "and if any material fact or circumstance shall not have been fairly represented, the policy shall cease and be of no effect." Following the chain of argument of Mr. Justice Blackburn, in the judgment already quoted, is not the fair meaning of this that if the insured has failed to state any material fact, to make the policy void, it must not have been unfairly omitted; and then, to judge of that, we must look at the application and say, if omitting to state that the lands on which the buildings stood were not owned but leased by him was "*unfair*," when the question asked him was, who *owned* the buildings?

On the whole, it seems to me if the buildings were owned by plaintiff, and it is admitted they were in one sense, and he gave the answers, now contended to be unfair and untrue, in good faith, in that view the jury should be told that the defendants had failed to make out the plea on that point.

I think that, in order fairly to judge of the answers of the plaintiff, evidence might be given to shew the surrounding facts, as to the situation of the buildings, who owned them, and who owned the land; and to shew the *bona fides* of plaintiff's answer, I think he might shew that the defendants' agent, who drew up the statement, had been informed by plaintiff, or some one else to plaintiff's knowledge, of the state of the title to the premises.

The fact that the insurance was effected some five years before the fire occurred, and that plaintiff had paid and the defendants received the premium of insurance during that period, on the basis of the proposal now complained of, is a circumstance which, as far as the *bona fides* of plaintiff is concerned, ought not to be overlooked. At first I was inclined to think the nonsuit was right, but after discussing the matter with my learned brothers, and looking at the further authorities referred to, I have arrived at a contrary conclusion.

On the whole, I think plaintiff ought not to have been nonsuited, and there should be a new trial without costs.

A. WILSON, J.—[After stating the pleadings, and the facts of the case, the learned Judge continued:]

I do not think it follows, though the conveyance of a house would, in ordinary construction, when the vendor owned the land on which it stood, pass the land as well as the house, or rather pass the land with the house, or under the designation of a house, that this would be the effect of the conveyance, if the vendor did not own the land and the vendee knew it, and did not in fact buy it; just as in *Doe d. Freeland v. Burt* (1 T. R. 701), where a cellar and wine vaults under a piece of ground, demised to the defendant, were held not to pass with the land, because they were then in the occupation of another tenant, and it was not the intention of the parties they should pass; and “whether parcel or not of the thing demised is always matter of evidence.” But if the cellar and vaults had not been separated from the piece or surface of ground, they would have passed with it: *Keyse v. Powell* (2 E. & B. 132). So, by the grant of a house or messuage, the orchard, garden, and curtilage do pass; and so an acre or more may pass by the name of a house: *Co. Litt. 5 b, 56 b*; *Taylor v. Clemson* (2 Q. B. 978). But I suppose there is no doubt, if the vendor did not own the orchard, garden, or other property within the curtilage, and the vendee knew it, and did not in fact buy them, that he

could not either claim he had bought them, or recover damages for breach of the vendor's covenant for want of title to them, merely because these outside properties would, in general contemplation of law, pass under the term house or messuage.

Such accessories may pass, but it does not follow they must pass : *Dyne v. Nuttley* (14 C. B. 122); *Cox v. Glue* (5 C. B. 533).

In *Dodd v. Birchall* (8 Jur. N. S. 1181) Martin, B., said, "In order to understand the meaning of the instrument, you should put yourself in the position of the grantor and grantee, and read it with all the knowledge they had at the time on the subject. Having assumed this position, the writing is to decide the rights of the parties : " *Anstee v. Nelms* (1 H. & N. 225).

He who is in possession of the surface is by presumption in possession of the minerals also; but this presumption may be rebutted : *Smith v. Lloyd* (9 Exch. 562); *Lewis v. Braithwaite* (2 B. & Ad. 437); *Curtis v. Daniel* (10 East 273); *Humphreys v. Brogden* (12 Q. B. 739); and the same rule must apply to a house or messuage, that he who has the possession of the house, has by presumption the possession of the land on which the house stands; but this presumption may be rebutted.

These houses might, for the purpose of arson and burglary, have been treated as the houses of the plaintiff, though he had no title to the land at all : *Rex v. Rogers* (1 Leach 89); *Rex v. Trapshaw* (1 Leach 427).

A grant or demise of a dwelling house would be satisfied by the grant of certain rooms or chambers in a house, if these rooms or chambers were all the vendor owned, and all that the vendee bought; for rooms or chambers may constitute a house or messuage : *Fenn v. Grafton* (2 B. N. C. 617); *Monks v. Dykes* (4 M. & W. 567); 1 Hale, 566.

I think then that the plaintiff should have been allowed to shew that he did in fact own the houses, independently of his having any further interest in the land than a mere standing place for them.

Then the next enquiry is, whether the plaintiff is precluded from recovering because he described himself as *owner* of the house, while he was merely lessee for years of the land on which they stood; and more particularly, when to a precise question, to state fully his *interest in the property insured*, whether owner, mortgagee, or lessee, he answered he was the owner.

I am disposed to think the answer was not untrue, though perhaps it might have been more precise.

If a tenant of land had power to remove his buildings, unless the landlord paid him for them, three months before the lease expired, and the landlord did not pay for them within the time allowed, the tenant might most truly say he was the owner of that building. So, if the owner of land were to sell a house which stood upon his land, and allowed the purchaser six months within which to remove it, the purchaser would be the owner in fact and in law of the house, and might insure it as such.

In this case, then, the landlord had no power to retain or detain these houses on declining to purchase them, and the plaintiff as tenant of the land had until the expiration of his lease within which to remove them. The houses were certainly not the property of the landlord, and the ownership of them was in the plaintiff.

The allegation of being *owner* may be an equivocal term, but I see no reason why it may not be shewn in what sense it was used and understood by both parties.

It certainly does not imply that the plaintiff had a *fee simple* estate in the house.

In *Lister v. Loble* (7 A. & E. 124) the trustees of a turnpike road were authorised to enter and take certain land, and to pull down certain houses, making satisfaction to the owners or proprietors for their loss, and it was held that the composition was payable not only to the owners in fee simple, but to lessees for years.

In the course of the argument Littledale, J., said, "Suppose there was a lease for 999 years at a nominal rent;" and counsel admitted such a case could certainly not be distinguished from that of an owner in fee, though in general

the owner or proprietor of land meant one who was tenant in fee.

Lord Denman, C. J., said, "The plaintiff was a lessee for years and was an owner or proprietor under this Statute. The words have no definite legal meaning: they may refer to the owners having either the whole or partial interests: these are properly speaking owners in each case."

Littledale, J., said: "These are not legal terms: they have no definite meaning: in common sense one would ask whose is the land? Who has the beneficial rent? Suppose there was a lease for 99 years, with no rent reserved; in common sense you would call the lessee the owner."

Neither the cases cited on the argument in 10 U. C. Q. B. 525, or 11 U. C. Q. B. 73, apply here; for these were mutual companies' risks, and the Statute has certain provisions applicable to them alone, and the parties there had not the title they represented they had.

I rather think that the answer was truly given, and that the plaintiff should have been allowed to shew the true facts, and the knowledge of the defendants of such facts, and that it should have been left to the jury to say whether the plaintiff communicated to the defendants, or led them to believe that he had an *estate* in the houses in fee simple, or merely an *interest* in them, as having the absolute property in or control over them to do as he pleased with them. In the last case he would be owner, in the popular sense, and in my opinion entitled to recover; in the former case, he would not be owner, nor entitled to recover; and if he said anything which fairly led the defendants to the conclusion that he had in fact the ownership in fee, he would properly be chargeable with fraud and misrepresentation; but that is a matter which has yet to be tried, and which a jury should pronounce upon.

I think the rule should be absolute for a new trial without costs.

J. WILSON, J., concurred.

Rule absolute for new trial, without costs.

TIFFANY V. BULLEN.

Attachment of debts—Garnishee an executor—Nature of indebtedness—Affidavit for order, who to make—Costs.

- Held* 1. That the mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as such executor to the judgment creditor.
2. That the Judge, to whom an application for an attaching order is made, should require the nature of the indebtedness to be fully stated; but where the Judge nevertheless granted an order without this statement, the Court, as the Statute does not expressly require it, refused to set the proceedings aside on this ground.
3. That an order founded on the affidavit of "the agent for the above defendant," without any affidavit by the judgment creditor or his attorney, is irregular; and such order was in this case set aside, but, the point being new, without costs. *Semble*, that had it been affirmatively shewn that the deponent was in fact the attorney of the judgment creditor, though not so described in the affidavit, the Statute would have been complied with.

In Michaelmas Term last, *J. K. Kerr*, on behalf of the plaintiff, obtained a rule *nisi* to set aside or rescind the order of Mr. Justice Adam Wilson of 9th September last, with costs, on the following grounds of irregularity :

1. The order was granted without any affidavit of the judgment creditor, or her attorney, as required by section 288 of the Common Law Procedure Act, and the affidavit of Macdonald, upon which the order was granted, was insufficient.

2. It was not shewn what was the nature of the indebtedness of the said Thompson and the other executors of George S. Tiffany to the said Frederick Tiffany, nor whether the latter could enforce his claim for such alleged indebtedness, nor whether this Court could enforce payment of such alleged indebtedness, nor whether the same could or should be attached by any order of a Judge of this Court.

3. That the said Proudfoot and other executors (referred to in said affidavit) were not indebted to Frederick Tiffany, save as executors of G. S. Tiffany, deceased; that they were alleged to be indebted to Frederick Tiffany, and there was no power given by the Statute to attach a debt due only in such a capacity.

Mr. Kerr, the attorney of Frederick Tiffany, stated in his affidavit, that he was informed and believed that the order complained of had never been served on Frederick Tiffany; that on the 6th November he obtained, on behalf of Frederick Tiffany, a summons to set aside the order, which summons was enlarged about the 11th November, by Mr. Justice Hagarty, in order that this application might be made.

The affidavit in question was made by one H. F. Macdonald, as agent for the above named defendant, being the usual affidavit made on garnishee applications, stating the indebtedness of plaintiff to defendants in several sums, and that James Richard Thompson, William Proudfoot and William Clark, as executors of George Sylvester Tiffany, were indebted to plaintiff in about the sum of fifteen thousand dollars.

On this affidavit Mr. Justice Adam Wilson made an order that all debts due or accruing due from the said executors, garnishees to the judgment debtor, should be attached to answer a judgment recovered in this Court against the judgment debtor, on 21st May, 1863, by the judgment creditor, as also the sums respectively found due to the judgment creditor by certain orders of the 2nd April and 28th November, 1862, respectively.

Proudfoot, one of the garnishees, by his affidavit, made the 15th October, 1867, stated that the order had been served on him on 16th September, 1867.

H. O'Brien shewed cause:—

The objection is a purely technical one. The attorney does not necessarily mean attorney in the cause: the term agent may well be included in that of attorney. The Statute does not say the affidavit can only be made by the judgment debtor or his attorney: *Earl of Mountcashel v. O'Neil*, 2 Ir. C. L. Rs. 436; C. S. U. C. ch. 22, sec. 288.

As to the nature of the indebtedness, the Statute does not require it to be stated: *Ward v. Vance*, 10 U. C. L. J. 269; *Herschfeld v. Clarke*, 11 Ex. 712.

Under the 50th section of the Common Law Procedure Act

of 1854, for a discovery of documents, the affidavit must be made by the party himself, Though it was there argued that it would be hard to deprive a corporation or sick person of the benefit of the enactment, yet the Court felt bound to hold that the affidavit there required must be made by the party himself, though then residing in Constantinople: *Barnett v. Hooper*, 1 F. & F, 412, 467; *Seymour v. Breckon*, 29 L. J. Ex. 243, 269.

Kerr, for Tiffany and the garnishees:—

The sections 189, 190, 191, have reference to discovery of documents in the possession of the opposite party. By the 189th section the affidavit must be made by the party seeking discovery. By the 191st section application is to be made upon the affidavit of the party, and of his attorney or agent. One object of the Legislature seems to be to have the affidavit made by a responsible officer of the Court, as well as by the party himself. The words “or agent” were not originally in the English Act.

Under section 199, as to admissions, the affidavit of the attorney, or *his* clerk, verifying this, is sufficient.

Under sections 109 and 110 the affidavit of the party or of his attorney may be required.

The words of section 288, under which this order was granted, clearly require the application to be made upon the affidavit of the judgment creditor, or that of his attorney: *Cataraqui Road Company v. Dunn*, 3 U. C. L. J. 27; *Chitty's Archbold*, 12th ed. 719; *Wilson v. Corporation of Huron and Bruce*, 8 U. C. L. J. 135; *Ward v. Vance*, 10 U. C. L. J. 269. *Burton v. Roberts*, 29 L. T. Ex. 484; *Jones v. Thompson*, E. B. & E. 63, and *Dresser v. Jones*, 6 C. B. N. S. 429, shew that it must be a debt before it can be garnished. A verdict not followed by a judgment, when the action is for unliquidated damages, is not a debt within the meaning of the Statute.

RICHARDS, C. J., delivered the judgment of the Court.

Taking the last objection first, that the garnishees are not indebted to the judgment debtor, save as executors of

George S. Tiffany, and there is no power under the Statute to garnishee such a debt.

Ward v. Vance (10 U. C. L. J. 269) is a decision in Chambers, which I believe has been frequently acted on here, that a debt due to an executor cannot be garnished on a judgment against such executor; but *Burton v. Roberts* (6 H. & N. 93) is a judgment of the full Court of Exchequer, that such debts may be garnished. In giving judgment Bramwell, Baron, said, "The Court is of opinion that when judgment is recovered against an executor, a debt due to the testator's estate from a third person may be attached under the garnishee clauses of the Common Law Procedure Act." In that case the Court said if the garnishee desired it a writ might issue against him.

In this case the converse of the proposition is contended for by the judgment creditor. The executors are indebted to the judgment debtor, and by the process of garnishment they are required to pay that debt to the judgment creditor. If it be really a debt which they are bound to pay to the judgment debtor, in principle I see no reason why they should not pay it to his creditor.

The inconvenience of applying these proceedings to cases where executors are parties seems to me to be as great when they are defendants in the action as when they are garnishees. If any question should arise as to priorities, I apprehend, on the application of the garnishees, either in shewing cause to the summons to pay over, or on a substantive application, a writ would be ordered to be issued under the 291st section of the Common Law Procedure Act. The proceedings to be taken under that section would afford executors an opportunity of setting up the same defence to the claim that could have been set up to it, if sued for by the judgment debtor.

As to the second objection.—I think, in practice, the Judge, to whom the application is made, ought to require that the nature of the indebtedness, as to which the garnishment proceedings are to be taken, should be fully stated on the application for the attaching order; but the Statute itself does not

require it, and when the Judge grants the order without such an affidavit, but with one in other respects sufficient under the Statute, I do not think we can set aside the proceedings for the omission of such statement. If the garnishee or judgment creditor, on the return of the summons, shews that the debt is one that cannot under the Statute be garnished, then no doubt the proceedings would be set aside, and probably with costs. In the absence of any information to shew that this debt was not garnishable, I fail to see any sufficient ground in this objection to set aside the order. This only leaves the first ground to be considered, that the affidavit on which the attaching order was granted, was not made by the judgment creditor or by her attorney.

I am not aware of any express decision on the point. These garnishment proceedings are sometimes characterised as extraordinary remedies, not known to the usual and ancient practice of the Court. At common law; I apprehend, the Court could not call on a person indebted to a judgment debtor to pay that debt to a third person, and the right to do so is, as to the Courts of Common Law, a new right, and, I take it, when a new right such as this is created, we must enforce it in the manner pointed out by the Statute creating it. Under the 288th section of the Common Law Procedure Act the provision is to the following effect : “Upon the *ex parte* application of such judgment creditor, * * and upon his affidavit or that of his attorney, stating that judgment has been recovered and that it is unsatisfied, and to what amount, and that some person is indebted to the judgment debtor, and is within the jurisdiction, a Judge may order that all debts owing by or accruing from such third person to the judgment debtor shall be attached to answer the judgment.”

Mr. Kerr, in his argument, commented on the language used in the various sections of the Statute to which he referred, and the case of *Herschfeld v. Clarke* (11 Ex. 712) expressly decides that, under the 50th section of the English Common Law Procedure Act of 1854, the affidavit must be made by the party himself seeking the discovery. The

provisions in both Acts are substantially the same. In the English Act it is, "Upon the application of either party * * upon an affidavit by such party of his belief," that a document, &c., is in the possession of the other party.

In our Statute, sec. 189, it is, "Upon the application of any party, stating his belief upon affidavit that any document," &c., is in possession of the opposite party. In the argument, in the case referred to, it was contended the Legislature could not intend to deprive a corporation or a sick person, unable to make the affidavit, of the benefit of that provision of the Statute. Alderson, Baron, said: "The 50th section requires an affidavit of the party himself: it may be inconvenient, but such is the language of the Act, and can it be said that the construction leads to an absurdity;" and in giving judgment he said, "We are all of opinion that an application under the 50th section must be made upon the affidavit of the plaintiff himself." It may be contended that the affidavit to be made under that section implies the possession of knowledge peculiar to the party making it, pledging his belief that a document is in the possession of the opposite party, and therefore the Court or Judge would not dispense with the production of such an affidavit. It is not put on that ground in the judgment, but on the bare words of the Statute.

In the section relating to garnishment, the facts to be stated may be said to be such as would be peculiarly within the knowledge of the judgment creditor or of his attorney. It is true that any person, on examining the rolls of the Court, might state the recovery of the judgment, and might have knowledge of the indebtedness of a third party to the judgment debtor; but the judgment creditor or his attorney would be the parties most likely to know if that judgment was "still unsatisfied and to what amount." If the amount was trifling, and could be obtained from the opposite party in the ordinary way, perhaps, the Judge in his discretion might refuse to garnish a large debt, the effect of which under the circumstances might be very annoying to the garnishee and almost ruinous to the judgment debtor.

In *Christophen v. Lotinga* (15 C. B. N. S. 809, S. C., 9 L. T. N. S. 688) an application was made to Willes, J., in Chambers, for discovery of documents under the 50th section of the English Act. The affidavit was there made by the clerk of the plaintiff's attorney, stating that the plaintiff was in Spain, where he resided and carried on his business. The learned Judge thought he might dispense with the affidavit of the plaintiff, considering the Statute directory, but not imperative. A rule *nisi* was obtained to rescind the order. On the argument a number of authorities were cited. Erle, C. J., said, "The words of the Statute are very few and perfectly definite, and I feel bound to give full effect to the letter, although I think that by so doing, I do not give effect to the spirit of the Statute." Willes, J. in the full Court, though not differing from the majority, still seemed inclined to consider the Statute directory, and referred to the case of a corporation seeking discovery.

In *Kingsford v. Great Western Railway Co.* (10 L. T. N. S. 722, C. P.) an application was made on behalf of the defendants, a corporation, on an affidavit made by their solicitor. Keating, J., referred the matter to the Court, who granted a rule *nisi*, and after full argument it was made absolute, the same Judges sitting as in the case in 15 C. B., except Mr. Justice Byles, instead of Mr. Justice Keating. In referring to the case in 15 C. B., Erle, C. J., said: "The wide words used by the Judges in that case must be considered in reference to the question before them. In that case there was a possibility of the affidavits being made, but here there is none. Some one must make the affidavit for the corporation, and their attorney is the proper person to do so." Willes J., said that all that was decided in the former case was, that distance and inconveniences are not sufficient grounds for dispensing with the affidavit of the party required by section 50.

There is no reason assigned in the case before us, why the judgment creditor, or her attorney, did not make the affidavit: there was no physical incapacity in their doing so that we are aware of, and the reasons which apply in the case of

a corporation do not necessarily extend to the parties who might and ought to have made the affidavit in the case before us. I think, on the whole, it is safest to invoke extraordinary remedies in the way authorized by the Statute permitting such remedies. The Legislature in their wisdom have thought proper to require that the proceedings should be taken in a certain way. That course has not been taken here, and I think the proceedings in consequence irregular, and they must be set aside.

The gentleman making the affidavit describes himself as the agent of the judgment creditor, whilst the affidavit filed and the copy of the order served are endorsed with the names of other gentlemen as acting for the judgment creditor. If it had been shewn affirmatively that this gentleman was the attorney of the judgment creditor, though he might not have been so described in the affidavit, we might possibly have held that the Statute had been complied with : *Halliday v. Lawes* (3 B. N. C. 541).

Rule absolute, without costs.

LAUR V. WHITE ET AL.

*Landlord and tenant—Lease and sub-lease—Cancellation of lease—Merger—
Con. Stat. U. C. ch. 90, sec. 7—Distress—Trespass.*

One I. leased certain premises for a term of years to B., who sub-let portion of them to plaintiff. Afterwards, by endorsement on the lease from I. to B., after reciting that they had mutually agreed to release each the other from the covenants and agreements contained therein, it was declared that said lease was therefore wholly cancelled at and from that date, and B. authorized I. to collect the rent under the lease from him to plaintiff. Subsequently, I. distrained upon plaintiff for two quarter's rent under B.'s lease to him. At the time of the distress, plaintiff had paid all rent then due for one quarter, being the first distrained for, to one C., under an agreement with B. so to do, with the exception of a small amount still unpaid. There was a second distress for the other quarter, the time of payment of both quarters having elapsed; and there was also in arrear at this time six month's rent under the lease from I. to B. Plaintiff thereupon brought trespass against I.:

Held, that the action must fail; first, that as the term created by the lease from I. to B. continued to exist, notwithstanding the cancellation of the lease, the rent which was incident to that term could be distrained for: that that rent being unpaid, might be set up in this action of trespass, as shewing defendants had a right to take the goods, being on the demised premises, as a distress for the rent due, just as they might have avowed for it, had the action been replevin; secondly, the rent being due under the lease from B. to plaintiff, and B. having authorized I. to collect and receive it, defendants might set that up under the facts shewn, as justifying the distress.

Held, also, that if the cancelling of the lease by I. and B. merged the term created by it, the right of I. to distrain was preserved by Con. Stats. U. C. ch. 90, sec. 7.

Trespass, *quare clausum fregit*, and taking and seizing divers goods and chattels of plaintiff, and converting same, with averments as to special damage. •

Second count.—Trespass to plaintiff's goods, in seizing certain articles enumerated, and converting same.

Defendants pleaded not guilty, by Stat 11, Geo. 2, cap. 19. sec. 2.

It appeared that on the 15th November, 1861, the defendant Ira White, owner of the premises in dispute, leased them to Benjamin F. White, for ten years, at a certain specified rent, payable half yearly,

On 20th June, 1864, Benjamin F. White leased to plaintiff, Peter Laur, the same premises, or a portion

thereof, for three years from 18th of August then next, at a certain rent, payable quarterly.

By agreement under seal, dated 9th December, 1864, made between Benjamin F. White, Peter Laur, and Joseph J. Carnaghan, reciting that White, being indebted to Carnaghan in \$200, agreed that he should be entitled and was authorized to demand and receive from Laur the \$200, White authorized and required Laur to pay Carnaghan the instalment out of the rent accruing due under his lease to him, and to deduct the sum out of the rent accruing to White, and Laur agreed to pay the instalments to Carnaghan in case default was made by White in payment thereof.

On the 11th May, 1865, by endorsement on the first recited lease, Ira White and Benjamin F. White recited that that agreement witnessed that they mutually agreed to release each the other from the covenants and agreements contained in the lease, and that the indenture of lease "is therefore wholly cancelled at and from this date."

On the 12th May, 1865, Ira White addressed a notice to Laur that he had that day appointed T. P. White his attorney and agent to take charge of all his lands and tenements in the 10th concession of Markham, and informing Laur that until he was otherwise directed he should arrange with T. P. White for all matters and things concerning the same premises thenceforward from that date.

On 19th February, 1866, the defendant Varden, as bailiff for Ira White, seized certain goods of plaintiff on the premises. He did not then put a man in possession or remove them until the following day, when they were removed and sold for \$223. On 19th February, he received a distress warrant from the defendant Truman P. White, signed "Ira White by Truman P. White, his attorney," authorizing him to distrain plaintiff's goods and chattels for \$75, amount of one quarter's rent due to him for the same on 18th November then last past.

On 20th February, he received another warrant from the same person, signed in the same way, to distrain against the

same person for one quarter's rent of the same premises, due on 18th February previously.

In addition to the documents referred to, which were put in at the trial, plaintiff proved the seizure of his goods, and that he had paid Carnaghan all the payments mentioned in the agreement. Up to the time of the distress he had made three payments: since that he had paid the balance.

Plaintiff also proved that he paid to Truman White \$30, which he said at the time Benjamin told him to pay on account of rent: the payment was made in September, 1865. The money was paid for rent to Benjamin.

The bailiff called by plaintiff stated that plaintiff admitted to him there were \$5 due on rent.

For defendant it was contended that trespass would not lie, the entry being made on the land, and the property seized as a distress for rent, and plaintiff himself, having admitted there were \$5 of rent due: that plaintiff had put in a lease to him from Benjamin White, but had not shewn he held under it: that Ira was the landlord, and this was admission of rent due to him.

The evidence given for defendants was the lease from Ira White to Benjamin White, its surrender, and notice to plaintiff of the fact, and proof that plaintiff had paid Truman White, Ira's agent and attorney, \$32 on account of rent, and that he had said he would as soon pay the rent to Truman as to Benjamin.

At the close of the case the defendant's counsel renewed his application for a non-suit, when leave was reserved to him to move.

The learned Judge charged the Jury that if plaintiff attorned as tenant to Ira White, the verdict ought to be for the defendant; that if any rent was due, the defendant had a right to distrain after the attornment; that when the lease was surrendered by Benjamin, the reversion was in Ira, and it supported the defendant's view that there was an attornment, and if his right had been denied, he could have turned the defendant out.

The defendant's counsel objected to the charge and

contended that by the cancelling of the lease between Benjamin and Ira, the plaintiff became tenant to Ira, whether an actual attornment or not, and that on that ground there should have been a non-suit.

The Jury found for the plaintiff—damages \$170.

In Michaelmas term, 1866, *McMichael*, for defendants, obtained a rule *nisi* to enter a non-suit, pursuant to leave reserved at the trial; or for a new trial on the law and evidence, and the verdict being contrary to the Judge's charge; and for misdirection in not telling the jury that the plaintiff could not recover, first, because the effect of the instrument executed between Ira White and Benjamin White, subsequent to plaintiff's lease, whether a surrender or cancellation, was that the plaintiff became tenant to Ira White, whether there was an actual attornment or not; and secondly, because his remaining there afterwards was evidence of an attornment, which estopped him from denying the title of the landlord, or that he was tenant under him; and in not telling the jury that under the evidence of actual attornment the plaintiff must fail.

The rule was enlarged until Hilary term, 1867, and again until Easter term last, when *Robert A. Harrison* shewed cause:—

The jury have found there was no rent due. The instrument under which Ira White claims was not a surrender. There were no operative words to pass the estate to him, the word "cancelling" not being sufficient. By the original lease from Ira to Benjamin an estate for years (ten years) was created, which passed to the latter by the lease: releasing the covenants and agreements in the lease, and cancelling the lease does not reconvey or revest the estate in Ira. *Ward v. Lumley*, 5 H. & N. 87, is express authority on the point. See also *Doe Burr v. Dennison*, 8 U. C. 185. Ira must show what estate he had: *Cameron v. Todd*, 22 U. C. 390; *Magrath v. Todd*, 26 U. C. 87; *Cornish v. Searell*, 8 B. & C. 471; *Whitton v. Peacock*, 2 Sc. 630; *Burton v. Barclay*, 7 Bing. 745; *Cuthbertson v. Irving*, 4 H. & N. 742; *Colles v. Evanson*, 19 C. B. N. S. 372.

The right of plaintiff to hold under his lease exists, though Benjamin White's right may have ceased under the original lease : *London & Western Loan Company v. Drake*, 6 C. B. N. S. 798 ; *Doe Beadon v. Pike*, 5 M. & S. 146 ; *Pike v. Eyre*, 9 B. & C. 909 ; *Bickford v. Parson*, 5 C. B. 920 ; *Upton v. Townsend*, 17 C. B. 30 ; 4 Geo. 2 cap. 28 sec. 6 ; *Doe Palk v. Marchetti*, 1 B. & Ald. 715 ; *Woolly v. Gregory*, 2 Y. & J. 536 ; 8 & 9 Vic., cap. 106, sec. 9 ; 14 & 15 Vic. cap. 7, sec. 7 ; Con. Stat. U. C. cap. 90, sec. 7. There is no transfer of the reversion to the original landlord.

McMichael, contra :—If the lease to Benjamin has not ceased to exist, Ira White has a right to distrain under it for the rent due by Benjamin. The evidence was ample as to attornment : *Doe dem. Chawner v. Boulter*, 6 A. & E. 675 ; *Doe dem. Wright v. Smith*, 8 A. & E. 258.

There was privity of estate between Ira and Benjamin White, and therefore either the surrender would operate to extinguish the lease, or there would still be the right to distrain for the rent, if the term existed, according to the reasoning in *Lumley v. Ward*. If there had been an *habendum* in the instrument, it would have passed the interest ; but there can properly be no *habendum* in a surrender. Secs. 7 & 8 of Con. Stat. of U. C. apply, and maintain the estate so as to authorize the distress for the rent due by plaintiff : *Bac. Ab.* IV. 873. "Surrender" ; *Com. Dig.* VII. 381, "Surrender" ; 2 Rolles Rs. 497.

RICHARDS, C. J., delivered the judgment of the Court.

I have looked at most of the cases referred to by Mr. Harrison, and it seems to me that this case, as far as the law is concerned, must be disposed of in one or the other of these alternatives ; either the instrument endorsed on the lease from Ira to Benjamin must extinguish the lease, so as to merge the term thereby created ; or it merely cancels the lease and the covenants to pay the rent, leaving the term in Benjamin still existing.

If the effect was to merge the term created by the lease from Ira to Benjamin, then I apprehend under the Con.

Stat. U. C. cap. 90, sec. 7; similar in its provisions to Imp. Stat. 9 and 10 Vic. cap. 106, sec. 9, Ira's right to enforce the payment of the rent under the lease from Benjamin to the plaintiff is preserved. The Stat. 4, Geo. 2, cap. 28. sec. 6 enabled chief landlords to take a surrender of old leases and grant new ones to their tenants, without prejudice to the right of such lessees to enforce the provisions of the leases which had been granted by them to their sub-tenants, and also preserving the rights of such sub-tenants under the leases they had received, notwithstanding the surrender of the first lease by the immediate landlord, and giving also the chief landlord a right to distrain for his rent. Nevertheless, if the chief landlord, being owner of the fee, had taken a surrender of his lease and it had merged, the sub-tenants would have enjoyed their *interesse termini* during the remaining portion of their term, and would not have been bound to pay any rent to the chief landlord. The Imp. Stat. 7 and 8 Vic. cap. 46, amongst other things, had a section similar to sec. 8 of our Statute, to remedy this evil, and the subsequent Act of 9 and 10 Vic. contained a similar provision, in effect the same as sec. 7 in our own Act already referred to, which was substituted for the former enactment. The provision was probably made in accordance with the third report of the Real Property Commissioners p. 49.

Sec. 7 of our Statute enacts, "When the reversion expectant on a lease of any land merges or is surrendered, the estate which for the time being confers, as against the tenant under the same lease, the next vested right to the same land, shall, to the extent of and for preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease."

Now, I understand the effect of this enactment is to declare, if the term created by Ira's lease to Benjamin is surrendered to Ira, the estate of the latter, which for the time being confers as against Laur the next vested right to the land, shall for preserving the covenants which would have existed under the lease to Laur but for the surrender,

be deemed the reversion expectant on the lease to Laur. And sec. 8 seems to establish this view of sec. 7, by providing that the person entitled to the estate into which the reversion merged shall have the like advantage remedy and benefit against the lessee for non-payment of the rent or performing covenants contained in his lease as the person who would for the time being have been entitled to the *mesne* reversion, which merged, would have had, if the reversion had not so merged.

In this view then, if there was any rent unpaid by Laur under the lease, he could not recover, for there was the right to distrain, and it was of no consequence what amount was due so long as anything remained unpaid.

There is the express admission that when the distress was made there were \$5 due. The evidence only shows a payment of \$32 or \$35, as I understand it, independently of the payment to Carnaghan, \$5. After deducting the payments to Carnaghan, there would be about \$40 on each quarter, payable to Benjamin, and after deducting the \$35 leaving still due on the quarter ending in November, and the whole \$39.50 or \$40 for the quarter due in February.

If we are to consider the term created by the lease from Ira to Benjamin as still existing, notwithstanding the surrender and cancelling of the lease, then it seems to me that *Lord Ward v. Lumley* is express authority that the rent attached to the *estate* created by the lease remains, and if so, being vested in Ira, he would have the right to distrain for any rent due him under the lease. In giving judgment in that case Martin, Baron, said: "When a man demises land for a term of years, reserving to himself a rent, the effect of it is to create two estates, viz., the estate of the lessee and the reversion of the lessor, and the rent is incident to the reversion. When the day of payment arrives the rent still remains annexed to the reversion. Here the question is whether the simply cancelling a lease destroys the lessor's right of action for the recovery of the rent. I am of opinion that it does not, because the cancelling a lease does not destroy the estates already vested, or their incidents."

Watson, B., said : "When the contract arises from the deed itself and the deed is destroyed, no action can be maintained in respect of it ; but this case is very different. Here, upon execution of the deed, there passed from the lessor to the lessee an estate which was not affected by the cancellation of the lease. The lessee holds the estate subject to the rent, which is incident to the reversion of the lessor. According to the argument of the defendant, he may hold the estate without payment of the rent ; but the authorities are clear that the cancelling of a deed does not divest the estate of the lessee, or deprive the lessor of his right of action on the demise."

Under the lease from Ira to Benjamin White, which was produced at the trial, it appeared that, according to its terms, there was due Ira for the premises in that lease six month's rent, on the 15th November, 1865, when the distress was made on 19th February, 1866. The premises held by the plaintiff are a portion of those included in the lease from Ira to Benjamin, as I understand. If we assume, as I presume we must, from the production of the lease and nothing being shewn to the contrary, that the six month's rent on the lease to Benjamin had not been paid, then Ira would have the right to distrain for it, and to seize any property which belonged to plaintiff, which was then on the demised premises. It is a sufficient answer in this action to shew a right to distrain : that seems to be sufficient. A mistake in the notice of how he claims the right does not make him a trespasser. *Woolly v. Gregory et al.* (2 Y. & J. 536) is a case sustaining the defendant's view on this point, and the facts in that case raise several of the questions which arise in this case. There, one Grainger, who held the premises from the Dean and Chapter of Westminster for forty years from 15th September, 1803, on the 15th September, 1809, demised the premises, reserving rent, for thirty-four years, less twenty-one days, to one Webb, whose interest was sold under an execution to Cook, under whom plaintiff held. Grainger became a bankrupt, and his interest was purchased by Gregory, who afterwards obtained a new lease from the

Dean and Chapter, the original lease to Grainger having been cancelled. The entry and seizure, for which the action was brought, was on a distress for rent, in the name of Gregory, who at the time of making the distress said the premises belonged to him. The notices of distress and the leases from Grainger to Webb, from the Dean and Chapter to Gregory, and the cancelled lease to Grainger, were produced.

In giving judgment Alexander, C. B., said: "We think the lease for thirty-four years, having been produced, which reserved a rent, and there being no evidence to shew that any rent had been paid, it follows that it is now to be taken that there was rent due on the demise from Grainger, which is the demise now belonging to Cook, under whom the plaintiff holds. We must presume, therefore, there was rent due to Grainger, for which he had a right to distrain on the premises. It appeared upon the trial that the original lease was cancelled, but we think, upon the state of the evidence, we must consider the lease subsisting, because * * * it has been held, upon the construction of the Statute of Frauds, that the cancellation of a lease is not of itself a surrender of such a lease. The authorities on this subject are collected in Bacon's Abridgment, Title 'Leases.' Grainger therefore had a right to distrain. It is objected to this view of the case that the notice of distress was not in the name of Grainger, but of Gregory. It must be remembered that in 1825 a new lease had been granted by the Dean and Chapter to Gregory, which no doubt the parties who distrained thought conferred on them the right so to distrain, for they gave the notice in the name of Gregory. But we are of opinion that their apprehension on this subject and the notice actually given in the name of Gregory do not preclude them from availing themselves of the title under Grainger, in the defence in this action. We think that the want of notice is a mere irregularity and does not warrant this action (*Trespass quare clausum domum fregit*), though it might be a special action on the case, under 11 Geo. II. cap. 19, sec. 19. The mere want of notice does not in our opinion make the parties trespassers *ab initio*. It was urged that they could not

avail themselves of Grainger's right, because there was no actual recognition of the act by him. We think that such recognition was not necessary."

I think we may dispose of this case without expressly deciding whether the cancelling of the lease by Benjamin and Ira White merges the term created by it; for if the term is merged, then Ira's right to distrain is preserved by our Statute. If the term exists, then the rent incident to the term was owing and Ira could distrain for that.

In either view it seems there was a right to distrain. Laur owed \$5 on one quarter's rent and about \$40 on the the other, as I understood the evidence, on the demise to him by Benjamin White, and both quarters' rent was due before the first distress was made; so that there really was a substantial sum due by Laur when the distress was made, though not for the full amount claimed. The first distress was more formal than real; no man left in possession, and no property disturbed; so that no substantial injury was done by it. The real distress, as I understand it, was on the 20th. There was then rent due to Benjamin, and a distress could be made for it. If the lease from Ira was merged or surrendered under our Statute, he had still the right to enforce the rent reserved by Benjamin's lease.

If Ira could not enforce it as rent due himself, he could still do so as rent due Benjamin, as acting for him, according to the doctrine laid down in *Woolley v. Gregory*, already referred to, the evidence clearly shewing that Benjamin had authorised Ira to collect the rent.

In *Trent v. Hunt* (9 Ex. 20) *Woolley v. Gregory* is recognized as good law, and the doctrine that it may be shewn from circumstances that the party, to whom the rent is legally due, authorised a third party to distrain for it, is fully established.

Phillips v. Whitsed (2 E. & E. 804) also confirms the doctrine so frequently laid down, that a man can distrain for one cause and avow for another, and that a wrong distress may be cured by a right avowry.

The effect of the endorsement on the lease from Ira to

Benjamin, releasing the latter from the covenants therein, no doubt would prevent an action of covenant against Benjamin to recover the rent, because that arises from the instrument itself; but the right to distrain for it remains with the term, which is not destroyed by the cancellation of the lease. The *reddendum* gives two remedies, one by action and the other by distress, and the release of the covenant does not affect the other remedy by distress.

The way in which the points were raised at *Nisi Prius* does not seem to have put the case in its proper light. The nonsuit was moved for because plaintiff had admitted there were \$5 of rent due; that Ira was landlord, and there was admission of rent due to him, which I understand referred to what defendant contended for, viz., that there was evidence that plaintiff had attorned, as tenant to Ira, and therefore when he admitted \$5 rent due, that admitted Ira was landlord. At the close of the case defendants' counsel contended that by the cancelling of the lease plaintiff became tenant to Ira, whether there was an actual attornment or not, and on that ground there should have been a nonsuit.

As we do not consider that the term was surrendered or merged, *Lord Ward v. Lumley* being authority for that, plaintiff never was in fact tenant of Ira in that sense, and the nonsuit could not be granted on the last ground, and as the jury found against the attornment, the nonsuit could not be granted on the first ground taken.

We consider the plaintiff's case fails on two grounds; first, that as the term created by the lease from Ira to Benjamin existed, notwithstanding the cancelling of the lease, the rent which was incident to that term could not be distrained for; that that rent not being paid, the defendants might avow for that, if this action had been replevin, and may set it up in this action of trespass, as shewing they had a right to take the goods, being on the demised premises, as a distress for the rent due; secondly, the rent being due under the lease from Benjamin to the plaintiff, and Benjamin having authorized Ira to collect and receive

that rent, the defendants may set that up under the facts shewn as justifying the distress.

We think, therefore, there must be a new trial.

Rule absolute for new trial, costs to abide event.

FORGE V. REYNOLDS ET AL.

Landlord and tenant—Rent payable in advance—Agreement to purchase demised premises—Cancellation of lease—Satisfaction of rent by payment of purchase money.

By an indorsement under seal upon a lease of premises it was agreed between landlord and tenant that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased; but that if the agreement became void by reason of the non-fulfilment of its terms before or at the time of payment of the second instalment, that the lease was to be and remain in full force and effect; and in case of the lease being cancelled, no rent *to be paid* after 3rd Febrnary, 1863, the date of the agreement to purchase. Under the lease the rent was payable in advance, and at the date of the agreement to purchase a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid under the agreement, and the interest also, according to the tenant's evidence, but according to the landlord's, it was not paid at the time, though he admitted that he had agreed to allow it to stand for some months afterwards: *Held*, that by the memorandum under seal indorsed on the lease the rent under it, payable in advance, was not to be paid in case the lease was cancelled, and that the lease was cancelled, in accordance with the agreement, by the payment of the second instalment of purchase money, even supposing the interest not to have been paid, for the landlord admitted he had waived its payment at the day, by suspending it to a future time; and therefore *Held*, that the landlord could not recover the quarter's rent which fell due on 1st February, as this was either satisfied by the agreement and payment of money on the 3rd February, when the first instalment was paid, or to be considered by the endorsement under seal on the lease as abandoned, with all other rent, whether accruing due before or afterwards.

Action against the defendant, as Sheriff, and his sureties, under their covenant given on the 10th December, 1862, pursuant to the Statute.

The first count of the declaration stated, that on 16th October, 1863, plaintiff placed a *fi. fa.* against the goods

of one Kemp in defendant's hands, as Sheriff; that on 20th October the defendant, Reynolds, while the writ was in his hands for execution, as Sheriff, received for plaintiff's use \$1050, or thereabouts, part of the moneys endorsed on the writ; that plaintiff frequently demanded payment of the said moneys, and though defendant paid a small portion of the money, he would not pay the residue, but converted and disposed of the same to his own use. The second breach charged that, after seizing Kemp's goods and chattels to the value of the money endorsed on the writ, and levying the same thereout, defendant had not the moneys so levied in Court before the commencement of the suit, nor had he paid over more than \$284, but falsely returned to the writ that he had made \$498 and 40 cents only, and that Kemp had no more goods in his bailiwick whereby he could make the residue of the debt or damages, or any part thereof, whereas in truth he had levied to the full amount endorsed.

Pleas.—1. Reynolds not guilty, as alleged.

2. As to first breach, he did not receive the money *modo et forma* for plaintiff.

3. To second breach, that he did not levy of Kemp's goods and chattels the money and interest endorsed on the writ, or any part thereof, as alleged.

4. Payment to plaintiff of all moneys, levied under the writ, to which he was entitled.

The 5th plea was an equitable one and stated, in effect, that a contest arose between plaintiff and certain attaching creditors of Kemp as to which of them was entitled to the money levied, whereupon an application was made to the Court, which directed that the plaintiff should either share the money with the attaching creditors, or submit to an interpleader to try the validity of his judgment, and that finally plaintiff consented to share the money with the attaching creditors, when the Sheriff distributed to each their respective portions.

The cause was tried at the last Fall Assizes at Whitby, before J. Wilson, J.

A great deal of evidence was given relative to the sale of property under the execution in favor of plaintiff, and the charges made by the Sheriff for taking care of the property and looking after the premises in which it was placed; but the only point on which anything turned material to be reported was as to a claim for rent made by one David Clark.

On the 15th. October, 1863, Clark notified the Sheriff that \$318.75 were due to him on the 1st of August, 1863, for three quarters' rent for the premises upon which the Sheriff had seized and taken in execution certain goods and chattels of Kemp, which he notified the Sheriff not to remove without first paying the rent.

On 1st May, 1862, Clark had leased the premises in question for three years from date, at a rental payable quarterly, in advance, on the first days of May, August, November, and February during the term, the yearly rent to be \$425; or \$325 the first year, \$475 the second year, and \$475 the third year.

On the 3rd February, 1863, by an instrument under seal, endorsed on the lease, it was agreed between the parties that the lease was to be cancelled, on payment of the second instalment of the purchase money payable under the agreement of purchase of that date; but if the agreement became void by reason of the non-fulfilment of the terms thereof before or at the time of the payment of the second instalment, then the lease was to be and remain in full force and effect: in case the lease were cancelled, "no rent to *be paid* after the 3rd February, 1863; otherwise, if the agreement for purchase became void.

The agreement for the sale of the land also bore the same date, and recited the agreement to purchase by Kemp of the premises in question for \$8000, payable as follows, \$500 on the execution of the agreement; \$500 with interest thereon at 8 per cent., on the 15th of April, 1863, and the residue of \$7000, with interest at 8 per cent., in eight annual instalments, with interest on the whole unpaid principal, on the 15th April in each year: the

interest on the last mentioned sum of \$500, and on the said sum of \$7000, to accrue from the day of the execution of the agreement.

There was a proviso if the several sums of money covenanted to be paid should not be paid according to the covenant therein contained; or in case of breach or non-performance of any of the covenants therein contained, on the part of Kemp to be performed, then the agreement and every matter and thing therein contained, and the interest of Kemp, should cease, determine, and be absolutely void, and Clark should thereupon hold the land and premises utterly discharged of that agreement and all covenants therein, without the payment or allowance by him of any sum of money whatever to Kemp, or any tenants or occupiers of the premises, for any money and improvements made by Kemp, or by them. It was expressly understood that time was to be of the essence of the agreement.

Kemp was examined under a commission, and stated that the first instalment under the agreement was paid on the 3rd February, 1863, and the second instalment of \$500 *and the interest* were paid on the 15th April, the day it became due, and there was no default or forfeiture of the agreement up to the time he left Canada, on the 10th October, 1863. He also stated that he could produce a receipt for the payment of the 15th of April.

The learned Judge reported that he left it to the jury to say whether the interest on the \$500, due on the 15th of April, was paid as well as the principal, and if so, to find for the plaintiff as to the full amount claimed by the Sheriff to be deducted on account of the rent.

Clark, the landlord, was called as a witness on behalf of the defendants. He produced and proved the lease, and that Kemp took possession of the premises under the lease, and that Kemp paid the first three quarters' rent and no more. He also proved the agreement of the 3rd of February endorsed on the lease, and stated he got the first and second instalments under the agreement,

amounting to \$1000, but no interest or insurance. He went into possession of the demised premises on the first week of November, 1863. He brought an action against the Sheriff (probably for removing the goods without paying his rent) in 1864, but that action was not proceeded with. He stated he had not declared the agreement forfeited. The interest, which should have been paid in April, he allowed to lie over until the Fall, as Kemp was about to make repairs, and it was not until after Kemp had gone away and he found the fence down, and the dam and mill out of repair, that he took possession of the premises as forfeited.

The counsel for the defendant, at the trial, amongst other objections, contended that the learned Judge should have charged the jury that the rent payable under the lease must be good as a claim for the instalment due in advance on the 1st February, 1863, at all events; and that the agreement between the parties, under which the payment of the rent was suspended, was not made until after the 1st February, on which day one quarter's rent *payable in advance* was due under the lease, so that as to that, the landlord was entitled, and the rent should be deducted from plaintiff's claim. He also objected to the ruling of the learned Judge as to the rent for the three quarters.

On this point the defendant had leave to move to reduce the verdict by \$318.75.

The jury found for the plaintiff, damages \$580.25.

In Easter Term last *Robert A. Harrison*, obtained a rule *nisi* to reduce the verdict, pursuant to leave, by the sum of \$318.75.

In Michaelmas Term last *Lauder* shewed cause:—The endorsement on the lease shews that no rent was to be paid under it, and after the payment of the two instalments under the agreement it was to cease in fact as a lease. The two instalments were paid, and therefore there can be no rent for which the landlord could distrain, or as

to which the Sheriff would be liable under the Statute of Anne, if he removed the goods. Kemp's evidence shews the instalments were paid.

James Patterson, contra :—The rent was, by the terms of the lease, payable in advance ; consequently, after the quarter day named, it was rent in arrear, and could be distrained for, and therefore the landlord could claim it from the Sheriff: *Woodfall's Landlord and Tenant*, 7 ed. 330 ; *Harrison v. Barry*, 7 Price, 690 ; *Buckley v. Taylor*, 2 T. R. 600 ; *Thurgood v. Richardson*, 7 Bing. 428 ; *Vance v. Ruttan*, 12 U. C. 632.

The rent on the 1st February, 1863, was payable at all events, and the agreement was not executed until the 3rd of February, and therefore the quarter of rent of the 1st of February was due and ought to be allowed the plaintiff. But the agreement never, by its very terms, was to become void, and the lease was to be in force if the second instalment of \$500 was not duly paid. Clark swears the interest was not paid on the 15th of April, but that he allowed it to stand over till the Fall. The giving of the extended time, being by parol, cannot waive the terms of the written instrument, as no new consideration appears to have been imported into the agreement to make it a substantive one, independently of the payment required by the old agreement.

RICHARDS, C. J., delivered the judgment of the Court.

As to the quarter's rent payable in advance, under the lease, on the 1st of February, 1863, suppose the agreement for purchase to have been carried out according to its terms, could Kemp have been called upon for that quarter's rent ? We must suppose the parties at the time they signed the memorandum on the back of the lease knew their several positions and their legal rights. Either Clark had been paid the rent that had accrued on the lease up to that time, or he had not. If the rent had been paid, he could not of course collect it. If it had not been paid previously to that time, then, I apprehend that the transactions are

evidence to shew that, on the purchase being carried out, no rent was after that to be paid under the lease. There were \$500 in cash paid to the landlord on that day, over four times the amount of the quarter's rent due on the 1st of February, and it was stipulated that \$500 more should be paid before the next quarter day. If that sum had been paid, and the interest on it, then there was no pretence whatever for demanding rent from the tenant when he was in under the purchase, and was paying the purchase money and interest from the date of the agreement to purchase. The occupation from that time forth was as purchaser under the agreement, and not as tenant. That would be the natural, reasonable and just view to take, and if the agreement of the parties can be construed so as to carry out that view, which was no doubt their intention, we ought so to construe it. By the endorsement on the lease, stipulating that it should *be cancelled* on the payment of the second instalment of the purchase money under the agreement, it was provided if that agreement became void before or at the time of the payment of the second instalment, the lease was to remain in full force and effect. In case of the lease being cancelled, no *rent was to be paid after the 3rd of February*; otherwise, if the agreement for purchase became void.

I understand it is now urged there is rent which can be demanded to be paid, notwithstanding the memorandum of the 3rd of February, and that this is so even if the lease were cancelled, and the agreement carried out by the payment of the second instalment. I have no doubt that in the absence of anything on the face of the writings to shew that from the nature of the agreement between the parties it is reasonable to suppose the quarter's rent, which was due at the making of the agreement, had not been paid, the Court, in furtherance of justice, and in accordance with what might be supposed to be the intention of the parties, would hold the words, "No rent to be paid after the 3rd of February," to mean, no rent accruing due by the terms of the lease after that day would be payable under it. But

when the use of the premises under the lease would only have been for three days, and the amounts to be paid under the agreement bear interest from the date of agreement, there is really no reason for supposing that the parties contemplated Mr. Kemp paying for the occupation of premises by a rent, when he was also paying for that same identical occupation, by paying interest and part payment of the purchase money. I think we may in this view hold that, as to the rent payable by the 1st of February, it either was satisfied by the agreement and payment of money between the parties on the 3rd of February, or that by the endorsement on the lease, (being under seal) there was to be no rent demanded under the lease after that date, whether accruing before or after; for certainly a release of all rent *to be paid* would discharge this over-due rent, and this is in substance a release, and might be pleaded as such. But of course if the payment due on the 15th of April on the agreement was not paid, the lease was to be and remain in full force, when of course rent would have to be paid, whether due before or after 3rd of February, and the day of payment would be after that date also.

It is to be observed that the second payment of \$500 and interest under the agreement was to be made on the 15th of April. There was no rent payable between the 3rd of February and that day, and the words, "in case of the lease being cancelled as above, no rent *to be paid* after this date," contained in the memorandum, would have no operation whatever, unless it applied to the rent then due.

The agreement for the purchase of the place, of the 3rd of February, is so complete in all respects, binding the purchaser to pay all taxes after that date, to keep the premises in repair, &c., that it affords strong evidence that the intention of the parties from that time forth was to act towards each other as seller and purchaser, rather than as landlord and tenant, provided of course that the second instalment of \$500 and interest should be paid on the 15th of April.

As to this payment, the jury have found it as a matter of

fact, both as to principal and interest, and the evidence of Kemp fully warrants that finding, and he says he has a receipt for it. Clark's own evidence is that the two sums of \$500 were paid, but the interest on the last payment of \$500 for two-and-a-half months, amounting to \$8.30, he says, was not paid, but he agreed to wait until the Fall for that. If he did so, and gave the receipt, I do not think he could afterwards claim that the agreement was forfeited, because he had not received the \$8.30 in cash then, and claim to retain the \$1,000 in cash paid on account of such agreement.

I think, under the facts shewn, any jury would come to the conclusion that the landlord had waived the forfeiture as to the non-payment of this \$8.30, even if it had not been paid. If he took a note for that amount, payable in the Fall, and gave a receipt in full for the second payment, that would be quite sufficient, and that state of facts would be consistent both with his evidence and that of Kemp. No attempt was made on the part of the landlord, from the time of the payment of the second sum of \$500 to the time that Kemp left, to assert any right to recover rent or possession of the premises, or to declare any forfeiture. It would be a sad reproach to our law, if after what was done the landlord could keep the \$1000 he received, and also claim the rent during the period the place was occupied by Kemp, because the latter had not paid the \$8.30 for interest on the 15th of April, when paying the landlord the \$500, the landlord, Clark, himself admitting he had told Kemp he need not pay it until November. However, under the evidence and finding of the jury on this point, it is not necessary further to discuss it.

We are all of opinion that by the memorandum under seal endorsed on the lease, the rent under it payable in advance was "not to be paid," in case the lease was cancelled, and we are of opinion the lease was cancelled, in accordance with the agreement, by the payment of the second instalment of \$500 and interest, on the 15th of April, 1863. The

lease having become cancelled no other suit could arise under it.

The rule will be discharged.

Rule discharged.

MCDOUGALL ET AL. V. COVERT ET AL.

Port Hope, Lindsay and Beaverton Railway Company—Contract by Directors individually—Company not bound—New trial refused.

Plaintiffs sued defendants for breach of an agreement to carry lumber for them from Peterborough to Port Hope at a stipulated price. The agreement set out, which was dated in November, 1865, recited that defendants were engaged in running the "Port Hope, Lindsay and Beaverton Railway" and the Millbrook Branch thereof, and by it defendants bound themselves to carry plaintiffs' lumber at a certain rate.

Defendants pleaded that the agreement was made by them as agents and directors of the Railway Company, of which plaintiffs had notice, and that by the 16 Vic., further amending the Act incorporating the Peterborough and Port Hope Railway Company, among other clauses of the "Railway Clauses Consolidation Act," was adopted a clause enacting, in substance, that no undue advantage, privilege, or monopoly should be afforded to any person, which said clause was contained in ch. 66 of Consol. Stat. C., entitled "An Act respecting Railways;" and that by the 18 Vic. the name of the "Peterborough and Port Hope Railway Company" was changed to "The Port Hope, Lindsay and Beaverton Railway Company"; that after the making of said agreement the rates of carriage were increased beyond those mentioned therein, and that the Company made no other charge against plaintiffs than against every one else.

It appeared at the trial that defendants were, at the date of the agreement, one President, and the other Managing Director of the main line of Railway from Port Hope to Lindsay, and lessees of the branch line leading from Millbrook, a station on the main line, to Peterborough; that by reason of the Company having been long insolvent the main line had been solely within defendants' control, as principal bondholders of the Company; and that what they did personally was in substance, therefore, done on the Company's behalf. The jury were asked to find whether the agreement was made by defendants acting as agents for and Directors of the Company, of which plaintiffs had notice, and having found in the negative and assessed damages in favour of plaintiffs, the Court refused to interfere with their verdict, as contrary to law and evidence, by granting a new trial.

This was an action for not carrying the lumber of the plaintiffs from Peterborough to Port Hope, at the prices

stipulated for and contained in an agreement between the parties under seal. The agreement, which was set out at length in the declaration, was made between defendants and plaintiffs, reciting in substance that the defendants were engaged in running the Port Hope, Lindsay and Beaverton Railway, and the Millbrook Branch thereof, and had agreed to convey plaintiffs' lumber from Peterborough to Port Hope over said line and the Branch thereof, at the rate of 5s. per 1000 feet, for four years, and thereafter at the rate of 7s. 6d.

Defendants pleaded, on equitable grounds, that the agreement was made by defendants as agents for and directors of the Railway Company, of which plaintiffs then had notice, and that by an Act of the Legislature of the Province of Canada, passed in the sixteenth year of Her Majesty's reign, intituled "An Act further to amend the Act incorporating the Peterborough and Port Hope Railway Company," it was, among other things, enacted that the 18th section of the Act incorporating the said Company should be repealed, and that among other clauses of "The Railway Clauses Consolidation Act," sub-section 1 of section 14 of the said Act was incorporated in the Peterborough and Port Hope Railway Company Act, by which said sub-section it was, among other things, enacted, that tolls should be from time to time fixed and regulated by the by-laws of the Company, or by the directors, if thereunto authorized by the by-laws, or by the shareholders at any general meeting, and should and might be demanded and received from all passengers and goods transported upon the railway, and which should be paid to such persons and at such places near to the railway in such manner and under such regulations as the by-laws should direct; and all or any of the tolls might by any by-law be lowered and reduced, and again raised as often as it should be deemed necessary for the interests of the undertaking; provided that the same tolls should be payable at the same time and under the same circumstances upon all goods and persons, so that no undue advantage, privilege, or

monopoly, might be afforded to any person or class of persons by any by-law relating to the tolls; and that said portion of said sub-section was contained in sections 20 and 25 of chapter 66 of the Consolidated Statutes of Canada, intituled "An Act respecting Railways"; and that by an Act passed in the 18 Vic. the name of the Peterborough and Port Hope Railway Company was changed to the name of the Port Hope, Lindsay and Beaverton Railway Company; and that after making said agreement, and before carriage of the lumber, said Company altered and changed the tolls and rates of carriage of lumber transported over their railway from Peterborough to Port Hope, to be charged against and to be paid to the Company by all persons sending lumber from Peterborough to Port Hope; from said rates mentioned in said agreement to other and different rates, to wit, ten shillings per thousand feet, as in declaration mentioned; and that the Company made and collected no other or different charge against plaintiffs from that which it made and collected from and against all other persons sending lumber by its railway from Peterborough to Port Hope, according to the provisions of said Act.

Issue.

The cause was tried at the last Fall Assizes held at Cobourg, before the Chief Justice of this Court.

The evidence shewed that Fowler was Managing Director of the Company, and Covert, President, in November, 1865; that the by-law altering the tolls was adopted the 25th of March, 1867, and was approved by the Governor in Council on the 13th of May following; and that by such tariff the rate for lumber from Peterborough to Port Hope was \$1.70 per thousand feet; that defendants were lessees of the Branch Road for ninety-nine years; that on 28th of December, 1866, all merged into one Company under the 18 Vic., the only thing for the completion being the delivery of the bonds, and that the Company had nothing to do with the agreement between plaintiffs and defendants; that the agreement was entered into by defendants in their individual capacity; that plaintiffs

would not bargain with the Company, nor were they considered as acting for the Company; that the Company was not considered as in solvent circumstances, there being unsatisfied judgments against them, and defendants had agreed to purchase the bonds of the Company at 70 cents; and that the Solicitor, who was employed by the plaintiffs to draw this agreement, said he had no doubt he knew that defendants were Directors of the Company, and that they controlled the whole thing.

The Chief Justice asked the jury to say whether the agreement was made by defendants, acting as agents for and Directors of the Railway Company, of which plaintiffs had notice, and they found it in the negative, and assessed the damages at the sum agreed to by the parties, if the plaintiffs were entitled to recover, at \$3030.85.

In Michaelmas Term last, *Galt*, Q. C., obtained a rule *nisi* for a new trial, on the law and evidence, which shewed that defendants were, at the time of entering into the agreement, on which this action was brought, President and Managing Director of said Railway Company, and that, although the agreement was not stated to be made by them, as Directors of and on behalf of the Company, it was manifest from the agreement itself that it was to be carried out by the Company, and was to carry lumber over the railway of the Company at a rate lower than that since sanctioned and approved, as required by law, and lower than that charged by the Company against other persons for the same services, and it was therefore illegal and void.

J. D. Armour shewed cause:—

The jury found defendants contracted on their own behalf. There can be no objection to their doing so: they might have agreed to carry plaintiffs lumber from Peterborough to Oswego at certain rates: *Wilby v. The West Cornwall Railway Company*, 2 H. & N. 703; *Branley v. The South Eastern Railway Company*, 12 C. B. N. S. 63;

and why may they not do the same thing from Peterborough to Port Hope?

The agreement was clearly a valid one when it was made, and it cannot be avoided because the Company have since increased their rates.

There was nothing to shew the agreement *ultra vires*, nor that plaintiffs knew defendants were Directors or agents of the Company.

If the prohibitions could apply, supposing such agreement had been made between plaintiffs and any other Directors of the Company, yet they cannot apply in this case, for these defendants are and were lessees of the branch line, and could do as they pleased with this particular part of it.

Bennet v. Covert, 24 U. C. Q. B. 38, shews that the general provisions which apply to Railway Companies do not extend to their lessees.

In *The Attorney General v. The Ontario Railroad Company*, 6 Grant, 446, the agreement was void at its creation, which distinguishes it from this case, even if the agreement could be said to have been made for the Company.

He referred also to *The Scottish North Eastern Railway Company v. Stewart*, 5 Jur. N. S. 607, and to the Railway Act, ch. 66 of the Consol. Stat. of Canada, sec. 9.

Galt, Q. C., contra:—

This agreement was manifestly made by defendants for the Company, because they really controlled the whole line, and that which cannot by law be done directly will not be allowed to be done indirectly. If this can be maintained, it would be an actual evasion of the Statute: *Fisher v. Bridges*, 3 E. & B. 642.

The 27 and 28 Vic. ch. 86 gave the practical control of this line to the bondholders, and defendants were the principal, if not the sole holders of such bonds, and the lease which they had of the branch line was confirmed to them by the 27 Vic. ch. 60.

A. WILSON, J.—The facts are that these defendants were, the one President and the other Managing Director of the

main line of railway from Port Hope to Lindsay, and lessees of the branch line leading from Millbrook, a station on the main line, to Peterborough, at the time when they entered into the contract, the subject of the present action; that in consequence of the Company having been long insolvent, the control of the main line has been exercised solely by the defendants, as the principal bondholders of the Company, who are entitled by Statute to be represented at the Board of Directors; and that what they do personally is in substance, from their position and the extent of their interest, done on behalf of the Company.

It is not contended that such an agreement as the present one would be binding on the Company, because it is contrary to that provision of the Statute which declares that "the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege, or monopoly, may be afforded to any person or class of persons by any by-law relating to the tolls"; but it is contended that this bargain is not made with or on behalf, or even in the interest of the Company, but by these defendants in their private and individual capacity; while, on the other hand, it is argued that the contract was in fact made for the Company; that the whole scope of it shews this was so, and that from the position and peculiar power of the defendants, it is manifest that what has been done by them will be put upon the Company, and therefore it is not a contract to be maintained, for it does in truth give an undue advantage, privilege and monopoly to the plaintiffs, however it may be disguised; for what the defendants do not collect from the plaintiffs will not be collected at all, as the defendants are virtually the Company; or what the defendants may have to make good, by way of deficiency upon the plaintiffs' tolls, they will, as they easily can and without check or control, indemnify themselves by taking it back again from the Company.

If this were a case in which one or two directors of a Company in active operation, having a numerous stock list,

and carefully looked after for dividends, or the hope of dividends, so that nothing which was prejudicial to the Company, as a substantive independent body, with rights and powers distinct from the governing members, could be continued for long, or would be tolerated, had made a contract, there would be no difficulty in separating the acts of the corporation from the acts of any of the Directors, if made or done in violation of the law.

The Company might be prohibited from adopting or from continuing to be bound by such a contract, and the Directors actually contracting might be compelled to make good to the Company the whole of the loss which had been occasioned by such contract; but the contract itself might well stand against the Directors themselves, who had so improperly or improvidently bound themselves.

The difficulty in this particular case is that it is said the Company is practically extinct, because insolvent, and that there is no one to look after the corporate affairs adversely to the defendants; the result of which is that, although the defendants may be personally bound, they are so situated that they are working the line to the injury of the public and in violation of the Act of Parliament, just as effectually as if the Company themselves were doing so, and it is the public whose rights are to be consulted and protected, and not those who have disregarded the law. Notwithstanding all this, there is nothing on the face of the contract which is absolutely against law, although there is very much which might properly have justified a jury in finding it so, because apparently an evasion of it; for the defendants may personally engage with the plaintiffs to carry their lumber for them over the railway at any price which they mutually agree upon, but that will not necessarily affect the Company. When the railway rates are above those of the contract, the defendants will lose; when they are below them, they will gain.

If the jury had found that the contract was made with these defendants personally, in order to evade the law, or was made by them on behalf of the Company, unquestionably it would have been a void deed: *Macgregor v. The*

Dover Railway Company (18 Q. B. 618) ; but they have found just the other way, and we are urged by the defendants to interfere, and at their instance to grant them a new trial, for the purpose of again trying to impeach the validity and legality of their own contract, and this we are not disposed to do.

If there is any vitality in the Company, some one may see that they do not lose by the contract, however it may fare with the defendants ; and we are not so persuaded of the absolute and perfect identity of the defendants and the Company as to interfere on purely public grounds with this contract, or the verdict rendered upon it.

Taking the evidence as to the branch line in connection with the agreement, I think a different question presents itself, for it appears the defendants are the lessees of the branch line, and that their lease has been confirmed to them by Act of Parliament. In such a case I should conceive that they were bound, if legally exercising the powers of the Company, to exercise them to the extent and in the same manner only as the Company could, and in no other or different manner.

It cannot be contended, I should say, that the lessees can charge whatever passenger or freight rates they may please to impose without any license or restraint ; and if the argument cannot be maintained to this extent, neither can it be maintained that the lessees may give unequal advantages and monopolies over their line to particular persons, to the prejudice of others. Whether there is such a reduced or beneficial rate given to the plaintiffs over this part of the road does not appear, though it might perhaps be inferred that it was so, for the plea states that the tolls were changed, for the carriage of lumber from Peterborough to Port Hope, from the rates mentioned in the agreement to *ten shillings* per thousand feet, which is a higher rate ; and a contract, which would give the plaintiffs any peculiar advantages, is not such a one which the defendants, in their character as lessees, could make consistently with the Statute and the public interest. But in a case of this kind nothing should be left to inference. If this contract be not

illegal by mere perusal, it must be shewn to be illegal by extrinsic evidence, and this has not been done.

The contract to carry from Peterborough to Port Hope was not invalid when it was made. It was not invalid from Millbrook to Port Hope, because the defendants could lawfully bind themselves to have carried over that part of the line the goods of the plaintiffs at any price they chose to agree upon; and it was not invalid from Peterborough to Millbrook, for there is no evidence that the rates of freight over that part of the line were less by the contract to the plaintiffs than they were to other people.

What is there then to shew that the freights from Peterborough to Millbrook have been since increased? or, even if increased, what is there to shew that the defendants do not charge to and receive from the plaintiffs the full rates over that part of the road which they charge to and receive from every one else using the road?

The late increase in freights over the whole line from Peterborough to Port Hope, from \$1 to \$2 per thousand feet, may, after deducting the full rate under the amended charge from Peterborough to Millbrook, leave less for the defendants to apply out of the contract price of \$1 per thousand feet for the carriage from Millbrook to Port Hope; but that is of no consequence, for the defendants were bound by their contract to make up any deficiency from their own private means arising on that part of the line, and they will now only be obliged to make up a somewhat larger deficiency.

If they can still out of the \$1 per thousand feet pay the full rate, last authoritatively settled, from Peterborough to Millbrook, it can make no difference to the *Railway Company* who pays the charge, whether the plaintiffs or the defendants, from Millbrook to Port Hope, so long as the full rate is paid; but it does make a difference, as between the plaintiffs and the defendants, which of them shall bear the loss over that part of the line, which has been occasioned by the increased rates.

The case of *McGregor v. The Official Manager of the Dover, &c., Railroad Company* (18 Q. B. 618) and *Taylor v. Chichester Railroad Company* (L. R. 2 Ex. 356) do not, I think, apply here. In the former case a person, interested in one of the Railway Companies referred to in the contract, agreed that if one of the Companies obtained an Act of Parliament, and would do an act contrary to the Statute, by handing over their scheme to the other Company, that the Company to whom the scheme was delivered, would do certain acts on their part; and the Court determined that, as the contract was for the doing of an illegal act and contrary to public policy, the agreement was void.

Now, the contract in question here was not that the *Company* should do anything illegal, nor was it made by or for the Company, as the jury found.

In the latter case the Company made the agreement direct with the plaintiff to appropriate their funds differently from what the Legislature intended they should, and so the contract was held void; but such a state of things is not applicable to this action.

I do not say there is not quite sufficient evidence to have warranted the jury in finding that the contract was made substantially by or on behalf of and with the Company, but they have not so found; and I do not know that, as a matter of law, I can say it was made by or with the Company, and not by and with the defendants personally. I cannot say, therefore, their verdict was wrong, as I should also have said if their verdict had been just the other way, and I think I should take their finding upon a clearly disputable fact.

In the absence of evidence on some material points before mentioned, and acting on the verdict of the jury as decisive of the fact of the Company not being parties, real or beneficial, to the contract, or that it has the effect of cramping, controlling, or affecting their transactions, or that it relates to any such purpose, though made between the defendants personally and the plaintiffs, the rule must be discharged.

RICHARDS, C.J.—Section 14 of 14 & 15 Vic. cap. 15, which is incorporated with the Railway Company's Act, provides the mode of passing by-laws to authorize the charging of tolls from passengers and goods passing over the railway, and how they shall be collected, and how the goods, on which they are due, may be detained and sold if the tolls are not paid, and other provisions of a similar character; and then the words following are added, "And all or any of the said tolls may by any by-law be lowered and reduced, and again raised, as often as it shall be deemed necessary for the interest of the undertaking; provided that the same tolls shall be payable at the same time and under the same circumstances upon all goods and persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-law relating to the tolls."

We are asked, under this particular portion of the section, virtually to declare that an agreement which even the railway itself, at the time it was entered into, could have legally made, which for anything we know to the contrary would have given to the Company ample and reasonable compensation for the services to be rendered, is illegal and void, because the Railway Company for the purpose, for anything that was shewn at the trial, of obtaining from the plaintiffs, by force of their virtual monopoly, an unreasonable rate for carrying their lumber, have framed a by-law, which has been approved by the Governor in Council, that nearly doubles the rate at which these defendants agreed to carry the lumber. The whole scheme of getting up this by-law may, for anything that appears before us, have been got up just to avoid this very contract, and we are asked to do all this for the relief of these two defendants, who chose to enter into this agreement for their own advantage. I should be very reluctant to yield to such a request, unless compelled to do so by the strongest authority, and the indisputable declaration, by the words of the Act of Parliament, that such was the intention of the Legislature.

Is it necessary, even in the case of a contract entered into

by the Railway Company in good faith, at a time when the Company could properly enter into such a contract, when in fact it was their interest to enter into the contract, to declare such a contract void, merely because some years afterwards, from the increased expense, perhaps, of working the Company, by the higher price of wages, fuel, &c., it was deemed right that the tolls should be raised? Would the party, who wished to place his business on a sure footing; who had made his agreement with the Company for carrying his lumber to be made at a certain mill, erected perhaps on the very faith of the agreement, say, for ten years, and by which agreement he had bound himself to pay the Company a fair price for the carriage of the lumber; would such a party not have good reason to complain that he was unjustly treated, if after five years the Company should be at liberty to repudiate such a contract, and charge him with a toll twice as large as that before charged, and which increase might entirely destroy his business, and render his property, bought expressly with a view of carrying on that business under the contract, in a great measure worthless? Was that what the Legislature meant, when they said the Company might by by-law reduce and again raise tolls as often as might be necessary for the interest of the undertaking, provided that the tolls shall be payable, so that no undue advantage, privilege or monopoly may be afforded to any one by any by-laws relating to tolls?

In such a case any advantage accruing to the party would certainly not be an *undue* one; would not be caused by anything that he had done, that would or could be objected to upon the strictest principles of mercantile honour; and if he lost the advantage of his contract, if it was a fair one, and proper to be entered into, it would seem to be by a violation of those principles by those who refused to perform a contract honestly made, and which at the time of the making of it was for the advantage of all parties.

If these observations would be true as regards an incorporated company, of whom it is too often said by parties who have been defrauded by them, that being corporations

they have no *consciencés*, *a fortiori* the argument would be stronger and could be more forcibly put as against two gentlemen contracting in their individual capacities, who desire to invoke the action of the Railway Company to relieve them from the performance of a contract entered into in good faith, and as to which no sufficient reason is given for not carrying it out. If it be absolutely necessary, in case of a Railway Company, to give force to *ex post facto* acts, so far as to set aside an agreement solemnly entered into, in order to carry out an Act of Parliament, I fail to see such necessity in this case. In the event of any person considering that plaintiffs would have "an undue advantage, privilege or monopoly," contrary to the Statute, if the Railway Company should carry their lumber at the prices named in their agreement, such person might apply to the Court of Chancery to restrain the Company from doing so, and if the Court should grant the injunction sought for, the provisions of the Statute would be complied with. Under such circumstances, however, the plaintiffs ought to have their remedy against the defendants, if they have not been guilty of any improper conduct, and there is nothing in the transaction, as far as they are concerned, that has come before us, to shew that any of their acts are even questionable.

I can well imagine, if colourable contracts are entered into for the mere purposes of avoiding the intentions of the Legislature, as expressed in the Statute, that such contracts ought not to be sustained; but when no imputation rests upon the parties in entering into the contract, we should only justify the breach of a fair contract on the ground of over-powering necessity.

If any decided case goes the length of shewing that a *bonâ fide* contract legally entered into may be avoided by a subsequent change in the rate of tolls, without any recompense or damages being paid or awarded to the party whose *rights* have been disregarded, I may feel bound to act in accordance with such a decision, as a matter of deference to the views of the Court which pronounced it; but

I certainly should not carry the doctrine beyond the very letter of the decided case.

However, in the case before us, it is not necessary to decide expressly on the question as to the Company being bound by an agreement similar to what was entered into by these defendants, as we are all agreed that in this action these defendants have not made out a case for the interference of the Court in any view that has been suggested to us, consistent with the established facts.

J. WILSON, J., concurred.

Rule discharged.

PENNYMAN V. MCGROGAN ET AL.

Ejectment—Devise—Condition in partial restraint of alienation.

A testator, who died in 1854, devised certain land to his two sons in fee, "but not to be assigned to any person, except a son of his, for the term of twenty years from the day of his decease":

Held, that the condition was not void, as in general restraint of alienation, and that the plaintiff, who claimed, in ejectment, under a title derived from the sons, in violation of this condition, could only recover such portion of the land as they were entitled to *as heirs* of their father.

This was an action of ejectment, brought by plaintiff against these defendants to recover, besides other lands, the west half of lot No. 11, in the fourth concession of the Township of Loughborough.

The plaintiff claimed title to the lands in question, as the mortgagee of Patrick McGrogan, deceased. The defendant McGrogan made no defence, but Alexander Hill defended as heir-at-law of his father, James Hill. Patrick McGrogan derived title to the west half of lot 11, in the fourth concession of Loughborough, from James and George Hill, who claimed it as the devisees of James Hill, their father. The defendant Alexander Hill set up title to this land as one of the heirs of James Hill, alleging that his brothers

took it as devisees from James Hill, but forfeited their right to it, by having sold it contrary to the condition, under which they held it, under their father's will. James Hill, it was admitted, was the owner in fee of this land, and died in 1854, having made a will on the 8th day of June, 1850, by which he gave and devised to his son George one-half of the premises, on which he then lived, and to his son James the other half, it being the west half of lot number eleven in the fourth concession of the said township of Loughborough, with this proviso, that the one, who might get the part with the buildings, should pay the other twenty-five pounds, subject, as aforesaid, to the maintenance and support of his wife and education of his son David : To have and to hold the premises devised to his sons James and George, and their heirs, but not to be assigned to any person not a son of his, that is, except a son of his, for the term of twenty years from the day of his decease.

The defendant Alexander Hill's position was, that the plaintiff's case shewed that George and James did assign the lot in question to Patrick McGrogan, from whom the plaintiff immediately derived title, and thus forfeited the estate which they took under the will ; and because there was no devise over as to this land, it descended to the heirs of the testator ; that at most the plaintiff could only recover the shares of George and James, and the defendant was at the least entitled to have a verdict entered for him for the share to which he was entitled as the heir of his father.

The case was tried at the last Assizes held at Kingston, before A. Wilson, J.

The plaintiff proved that James Hill died in 1854 in possession of this lot, as the owner in fee ; that he made a will, as above-mentioned, containing the devise set forth, and that on the 25th of April, 1857, James Hill, the devisee, mortgaged this lot to the Kingston Permanent Building Society.

It was here objected that James had no power to assign, except to a son of the testator, within twenty years, which

had not elapsed, and that the conveyance to the Building Society was inoperative to pass an estate. It was urged, in answer, that by the devise an estate passed to James and George in fee, as tenants in common, and any condition, not being a condition precedent, could not derogate from the force of the devise; that the condition was void, as interfering with the right of alienation; that it was possible there might be no son of the testator living for the whole of the twenty years, in which case the condition would be determined; therefore, the mortgage would not defeat the estate during that period of twenty years.

The plaintiff put in and proved a deed, dated 16th July, 1859, from the said Building Society to Patrick McGrogan, conveying this land to him in fee; also a deed, dated 5th June, 1861, from George Hill to Patrick McGrogan, conveying to him in fee an undivided moiety of this lot; also a mortgage, dated 4th April, 1863, from Patrick McGrogan to the plaintiff, of this lot.

This was the plaintiff's case. The objections already referred to were again renewed, when leave was reserved to enter a nonsuit or verdict for the defendant, if the Court should be of opinion they were well founded.

The defendant then proved that the testator's eldest son was John, who was dead and had no children; that James, Alexander and George, his sons, were yet living, and that the witness did not know whether David the youngest was living or not; that there were three daughters, who were living and married.

The learned Judge charged in favor of the plaintiff, and the jury found a verdict for him.

During Easter Term Sir *Henry Smith*, Q.C., obtained a rule *nisi* for a new trial, on the ground of the verdict being contrary to law and evidence, in this, that the verdict was general for plaintiff, whereas the evidence shewed him entitled to but an undivided two shares of the property claimed by defendant Alexander Hill; that said defendant Hill was legally in possession of said premises, in so far as his share,

as one of the heirs of his father, permitted him under the will; that plaintiff only took the interest of James Hill and George Hill, as heirs as aforesaid; and for misdirection, in this, that the Judge told the jury plaintiff was entitled to recover generally, though there was a forfeiture under the will of James Hill, under whom plaintiff claimed; or, to amend the verdict consistently with the evidence, and limit it to two shares of testator's estate, proportionate to the number of his children living at the time of the conveyance by James Hill and George Hill to Patrick McGrogan, under whom plaintiff claimed; or to enter a verdict for defendant Alexander Hill for such portion as the Court might order.

Moss shewed cause, citing *Atwater v. Atwater*, 18 Beav. 330; *Muschamp v. Bluet*, Sir. J. Bridg. 137; *Doe Gill v. Pearson*, 6 Ea. 371; *Bergin v. Sisters of St. Joseph*, 22 U. C. 204.

Sir *H. Smith*, contra, cited *Bac. Ab.* "Condition," p. 647; *Viner's Abr.* "Condition," 5; *Lyster v. Kirkpatrick*, 26 U. C. 217; *Lyster v. Ramage*, *Ib.* 233.

J. WILSON, J., delivered the judgment of the Court.

It is said in *Smith* on Real and Personal Property, page 65, "Where a conveyance or devise is made of real property for an estate in fee, or a conveyance or bequest of the absolute interest in personalty, subject to a condition in general restraint of alienation, such a condition is void for repugnancy, as a power of alienation is inseparably incident to such an estate or interest. But a condition not to alien real or personal estate to a particular person, or for a particular time, is good."—*Co. Litt.* secs. 360, 223 *a*, secs. 361, 223 *b*; *Shep. Touch.* 76; *Ware v. Cann* (10 B. & C. 433).

In this case, the restraint on alienation is only for a particular time, namely, twenty years, during which the devisees may alien to any of the sons of the testator. But is it shewn that within the twenty years next after the death of the testator James and George both assigned their estate to McGrogan, and therefore forfeited it?

It is a rule of common law that no one can take advan-

tage by entry for breach of a condition but parties and privies in right and representation. The defendant Alexander Hill had a right, as one of the heirs-at-law of his father, to enter: he is found in possession claiming as heir of his father, and now asserts his right to his share.

The case discloses that the testator died in 1854, leaving four sons and three daughters. The defendant is, therefore, entitled to an undivided seventh share. The plaintiff is, on the strict shewing of the case, entitled to two-sevenths. The verdict will therefore be for the plaintiff for two undivided sevenths, and will stand for the defendant for the rest.

We have been referred to, *Muschamp v. Bluet* (Bridgman, 137), as an authority to shew this was a void condition, but we think it does not apply. See *Atwater v. Atwater* (18 Beav. 330).

Judgment accordingly.

MCWHIRTER V. LEARMOUTH.

Insolvency—Assignment to non-resident assignee—Ratification—Execution—Priority—Evidence.

Held, following *Hingston v. Campbell*, 2 U. C. L. J. N. S. 299, and *Whyte v. Cuthbertson*, 17 C. P. 377, that a voluntary assignment to an official assignee must be to one resident in the county within which the insolvent has his place of business; but, *Semble*, that the creditors may acquiesce in an assignment to a non-resident official assignee, and thus constitute him their assignee.

In this case, the defendant's execution was placed in the Sheriff's hands on the 28th June, the assignment made on 16th July, and the meeting of creditors, at which defendant attended, by his attorney, who examined the insolvent, and did not object to the assignment, and at which it was agreed to discharge the insolvent, was held on 28th August following:

Held, that even if the creditors had adopted plaintiff as their assignee, which it did not appear they had, such adoption would not have divested defendant of his rights under the execution, as their ratification of the assignment related back only to the date of the meeting of creditors, not to that of the assignment itself.

Per A. Wilson, J., that the assignment might have been set aside by the Judge in Insolvency, at the instance of any of the creditors, and *Semble*, that this was the only and proper remedy, and that from such a decision an appeal might be maintained.

Held, also, that defendant was not required, in the interpleader issue between himself and the assignee, to prove his judgment and execution.

THIS was an interpleader issue, and an appeal from the County Court of the County of Norfolk.

The plaintiff was the official assignee in insolvency for the County of Oxford, the defendant an execution creditor of the insolvent, one Little.

It appeared that Little, while residing in the County of Middlesex, was engaged in lumbering in several of the adjoining counties, and that becoming embarrassed he made a voluntary assignment for the benefit of creditors to the plaintiff, who was official assignee for the County of Oxford. It further appeared that the defendant, by his attorney, attended a meeting of Little's creditors, and examined the latter, making no objection then to the validity of the assignment.

At the trial the defendant gave no evidence of his judgment and execution, under which he claimed the goods in dispute.

The jury found a verdict for the defendant, which was moved against in the following County Court Term, the plaintiff contending that under the second section of the amended Insolvent Act of 1865, the insolvent had a right to make the assignment to the plaintiff, without reference to his place of business; that the consent to the insolvent's discharge, put in and filed on the trial of the cause, containing a majority of creditors of \$100 and upwards, and representing more than three-fourths in value, bound the minority, and that for this reason the defendant, being one of the minority, was estopped from disputing the plaintiff's title, and the assignment to the plaintiff became thereby confirmed; that the attendance of the defendant at the meeting of creditors, for ordering the affairs of the insolvent, by his attorney, who appeared for him and examined the insolvent, without protesting against the validity of the assignment, operated as a waiver of his right thereafter to object to it; and that the plaintiff was entitled to succeed against the defendant, because the defendant had not proved any judgment recovered, or execution issued thereon, &c.

The rule granted on this motion, was, after argument,

discharged by the learned Judge of the County Court, and the plaintiff thereupon appealed to this Court.

In Easter Term last *Robert A. Harrison*, for the appeal, cited *In re Owen*, 12 Grant, 446, 560; *Whyte v. Cuthbertson*, 17 C. P. 377; *Grant v. Wilson*, 17 U. C. R. 144; 27 & 28 Vic. ch. 17, sec. 2, sub-sec. 7, and sec. 9; 29 Vic. ch. 18, sec. 12; *Converse v. Michie*, 16 C. P. 157; *Thorne v. Torrance*, 16 C. P. 445; *Whitaker v. Lowe*, L. R. 1 Ex. 74; *Ex parte Bonsor*, 2 Rose, 61; *Ex parte Malkin*, 2 Rose 27, 33.

F. Osler, contra, cited *Whyte v. Cuthbertson*, *supra*; *Hingston v. Campbell*, 2 U. C. L. J. N. S. 299; 27 & 28 Vic. ch. 17, sec. 2, sub-secs. 2, 3, 4, 5, sec. 9, sub-secs. 3, 9; *Holden v. Langley*, 11 C. P. 407; *Patterson v. Langley*, 11 C. P. 411.

J. WILSON, J.—We think this appeal must be dismissed. In *Hingston v. Campbell* (2 L. J. N. S. 299) and in *White v. Cuthbertson* (17 C. P. 377), on the same principle, it has been held that a voluntary assignment to an official assignee must be made to one resident within the county within which the insolvent has his place of business. Here the evidence shows that the insolvent never had any place of business, nor was ever resident in the County of Oxford; but that, while he carried on the lumbering business, he resided in Middlesex, and carried on that business in the adjacent counties, but not in Oxford; that for a year and a half before his insolvency he had ceased to carry on lumbering business, and was engaged in oil speculations in London. It was properly left to the jury, on the evidence, to say whether he had ever carried on business and resided in Oxford. They found he had not, and this disposes of the question as to the plaintiff's title to the goods in dispute. His title to them depended solely upon his right to them, as official assignee in the County of Oxford, which under the finding of the jury he was not. If they were not his, they were still the property of Little, the defendant, and were liable to seizure on the execution of Learchmouth, the

now respondent, who was not required, under this interpleader issue, to shew his judgment. We all agree that the insolvent can make an assignment only to one of the official assignees resident within the county or district wherein he has his place of business, and we concur in upholding the cases deciding this point.

It may be that the creditors may acquiesce in such an assignment, so as to constitute the official assignee their assignee; but, in this case, we do not think that such an adoption of the plaintiff, as assignee, took place as entitled him to recover in this action. The execution was given to the Sheriff on the 28th day of June, the assignment was made on the 16th of July, and the meeting of creditors was held on the 28th August. On this day, in this view of it, the creditors adopted the plaintiff as their assignee, but it did not divest the defendant of the rights he had acquired on his execution. The appeal will be dismissed.

A. WILSON, J.—The debtor, if *he* assign, must assign to an official assignee, who is resident in the county within which the insolvent has his place of business.

This plaintiff was not such a person. Proceedings, however, went on in Insolvency so far that the creditors agreed to discharge the insolvent. The plaintiff, though selected at first by the debtor, continued after the meeting of creditors still to act as assignee, and it appears to me he must be deemed then to have been acting as assignee for them, for they may appoint any person they please.

There is no reason why they might not adopt him as their own nominee, and so continue the proceedings which were irregularly begun; and it is desirable to support proceedings taken in good faith, when they have once been ratified.

There must be some period, in the course of an insolvency suit, when such a defect must be considered as passed over and cured; for if not, the most serious consequences would follow, if, after lands sold by the assignee, debts collected, and dividends paid, the whole of the proceedings could be

undone for such a cause. If not curable, the same defect must equally avoid the debtor's final discharge, when the whole estate has been wound up, and subject him to all his old liabilities; and it might perhaps give him a right against his assignee and all his creditors, and others who have been partitioning and disposing of his estate among themselves.

As the original assignment was irregularly made, it might, I think, have been set aside by the Judge in Insolvency, at the instance of any of the creditors who chose to complain of it, and I am not sure but this was the only and proper remedy to be taken, and from such decision an appeal might probably be maintained.

I should have thought that, as defendant, who is the judgment creditor, and who alone, so far as we see, is affected by the composition having relation back to the assignment made by the debtor, had attended the meeting of creditors when the majority in number and value agreed to discharge the debtor, and did not then object to the validity of the assignment which was made, and did not then claim a priority for his execution, that he was concluded from disputing the proper appointment of the plaintiff, as the creditors' nominee, and therefore, so far as he was concerned, the ratification by the creditors should have relation back to the time of the assignment which was made by the debtor; but as the other members of the Court think that it cannot have relation further back than to the time of the creditors' meeting, I cannot say I feel so strongly on this point that I should differ from them, for the rule is that rights acquired are not in general to be divested by the doctrine of relation.

If the creditor had, however, attended at the meetings, and had permitted the estate to be sold, and dividends to be made, and other acts of that kind to be done, I should have held him to have been absolutely bound and concluded from disputing the validity of the original assignment, and from setting up his rights under the execution. The doubt with me is whether he has not already done

sufficient to have this effect against him, and whether what he has done should not have been left to the jury to say if he had done it with the intent of waiving the irregularity or defect, and his right as an execution creditor, and if he had assented to the whole estate being administered in insolvency: *Lancaster, &c., R. W. Co., v. Heaton* (8 E. & B. 952.)

RICHARDS, C. J., concurred.

Appeal dismissed, with costs.

THOMPSON V. LEACH.

Agreement—Proviso—Cesser of obligation—Want of notice to obligee—Pleading—Measure of damages—Amendment—Costs.

By an agreement under seal between plaintiff and defendant, and under the 4th clause thereof, defendant agreed with plaintiff to continue to run his vessel between two ports named, for the period of six weeks, and at the time of the agreement plaintiff paid defendant \$2000, which the latter was to retain, subject to his continuing to run the vessel between such ports for the said period of six weeks, and up to the 27th July then next, at his own risk and for his own benefit, and for a further period named, provided that during the six weeks the gross earnings of the vessel should not be less than \$75 per running day, with the same proviso as to the further period; and provided, also, that upon plaintiff's paying up any deficiency in said rate of \$75, at his option, he might require said vessel to continue her running during said period. On the expiration of the first week defendant ceased running his vessel, and to an action at plaintiff's suit for breach of his agreement, which was set out *verbatim* in the declaration, defendant pleaded that the agreement on his part to run the vessel during the period mentioned was subject to the proviso above stated, as to the \$75 per day, averring that on or before the expiration of the first week that amount was not realized, and therefore on that day he discontinued the running:

Held, on demurrer to this plea, that the construction of the agreement was not that defendant was obliged to run the vessel for the six weeks unconditionally, and whether she realized the \$75 per running day or not, but that it was subject to the proviso that that amount should be realized, and that therefore the plea was not bad on this ground; but that it was bad as not shewing that defendant had notified plaintiff of the deficiency, so as to have allowed him to make it up, if he desired so to do, and insist upon the vessel's continuing her trips for the specified period under the agreement. But, *Held*, that as it was probable plaintiff had in fact notice of the stoppage of the vessel, defendant should be allowed to amend his plea in this respect, on filing an affidavit to that effect, and without being obliged to pay the costs of the argument of the

demurrer, as neither party had raised the point, but on payment of the costs of the day of the trial, which had previously taken place, and at which a verdict was entered for plaintiff for 1s. damages, subject to the opinion of the Court whether it should be increased to such a proportion of the \$2000 as would represent the five weeks which the vessel had not completed under the agreement; and as to which, *Held*, that the measure of damages which the plaintiff was entitled to recover for the non-fulfilment of the agreement was such proportion, being five-sixths of the \$2000, and that he was not obliged to prove his damage, as this was fixed by the agreement in question.

The declaration, after setting out an agreement between plaintiff and defendant, as to the running of a certain vessel, called the "Rothsay Castle" between Toronto and Niagara, went on to aver that by a certain memorandum of agreement under seal, subsequently made between the same parties, the previous contract was vacated, and the agreement, which is in effect contained in the head-note, was substituted in lieu thereof, with the addition, besides other stipulations, which it is unnecessary to mention, that plaintiff was to pay defendant, on the 1st August then next, the deficiency arising from the running of the vessel for the two previous weeks, amounting to about \$720, subject to the stipulations referred to in the head-note. The declaration then charged, as a breach on defendant's part, that the running of the vessel was discontinued within the agreed period, and claimed \$2500 damages. There was also a second count for money advanced by plaintiff to defendant; money paid, and money had and received.

The defendant, as a first plea to the first count, pleaded *non est factum*, and as a second plea thereto he pleaded as in the head-note, and to the second count, never indebted. The plaintiff joined issue on all the pleas except the second plea to the first count, to which he demurred, assigning as causes of demurrer, that the agreement of defendant to run the vessel was absolute and unconditional until the 27th of July then next; and was not subject to any proviso or condition.

The cause was tried at the last County of York Assizes, before Hagarty, J.

No evidence was offered.

Plaintiff's counsel contended that, as defendant ran the vessel for one week only instead of six weeks, plaintiff was entitled to recover back from defendant five-sixths of the \$2000 paid by plaintiff to defendant as the consideration for his running the vessel for six weeks. Defendant's counsel, on the other hand, contended plaintiff must prove the actual amount of his damage.

It was agreed that the verdict should be for plaintiff, and 1s. damages, with leave to plaintiff to move the Court to increase the same to \$1666.66, if, in the opinion of the Court, plaintiff was entitled to recover such five-sixths of the \$2000 aforesaid.

Crooks, Q. C., now moved for and obtained a rule *nisi* accordingly.

McMichael shewed cause :—The defendant, by the bargain, is entitled to retain the \$2000, and the plaintiff cannot recover more than a mere nominal amount of damage, because he did not prove any damage sustained : *Sedgewick* on Damages 274 ; *Mayne* on Damages, 84 ; *Moses v. Macfarlan*, 12 Bur. 1010 ; *Owen v. Raith*, 14 C. B. 327.

[The Chief Justice referred to *Borries v. Hutchinson*, 18 C. B. N. S. 445.]

Crooks, Q. C., contra :—It is admitted if the plaintiff's verdict be increased, that \$770 shall be deducted out of the \$1666.66. *Gibbs v. Gildersleeve*, 26 U. C. R. 471, shews the measure of damage in such a case. If this agreement had not been under seal, *Goodman v. Pocock*, 15 Q. B. 576, shews that the plaintiff could have recovered the amount he now claims to have the verdict increased to according to the extent of the defendant's failure of contract. See also *Stevenson v. Snow*, 3 Bur. 1237.

Crooks, Q.C., also appeared in support of the demurrer :—The fourth clause of the agreement shews the steamer was to be run for the six weeks, and it was not a condition precedent that the earnings should have been \$75 per day.

The declaration and plea are the same as if the agreement had been set out on oyer.

McMichael, contra:—The defendant has in his second plea stated the agreement as he alleges it to be. If he have not truly set it out, the plaintiff should have corrected it by his replication: by demurring to it he admits it to be just as the defendant has stated it. The agreement, therefore, as to this part of it, must be assumed to be as the defendant has stated it in his plea, and not as the plaintiff has set it out in his declaration, if there be any difference between them.

The defendant was at liberty to stop the running any day that the gross earnings did not exceed \$75.

A. WILSON, J., delivered the judgment of the Court.

It is necessary to determine whether there is any difference in that part of the agreement, as set out by the defendant in his second plea, from that as set out by the plaintiff in his declaration; and if there be a difference, whether the agreement is to be considered according to the plaintiff's or according to the defendant's version of it.

The defendant says the agreement to run the vessel was subject to a proviso that the gross earnings should not be less than \$75 each running day, and that it was found they did not amount to \$75 for each running day, and therefore the defendant ceased to run the steamer.

The plaintiff says the agreement was not subject to such a proviso, but was an absolute and unconditional engagement to run the vessel, for the first six weeks, at any rate.

The agreement, after reciting the previous indenture, by which the vessel was to be run at the plaintiff's risk to the extent of \$110 per day, declares that the defendant shall continue to run the steamer until the 27th of July at his own risk and for his own benefit; and further, that he will continue to run the steamer as aforesaid until the first of September next, provided that during the period of six weeks, that is, to the 27th of July, the gross earnings are not less than at the rate of \$75 each running day; and provided the gross earnings of the further period, to the 1st of September, are not less than at the same rate of \$75 per day. Does this agreement mean that the defendant

shall run the vessel to the 27th of July, although the daily rate of gross earnings was less than \$75, but that he shall not be obliged to continue on the further period, till the 1st September, in case the daily rate for such first period has not been \$75 ?

Does it mean that the defendant shall not be obliged to continue for the *second* period, in case the first period does not produce \$75 a day ? Or does it mean that the defendant shall not be required to run during the *first* period any longer than while the receipts are \$75 a day during that period ?

Stating the agreement as to the two periods of running consecutively, and then the two provisoes as to a cesser consecutively, gives to the first proviso, which follows immediately after the second period of running, the appearance of construction which the plaintiff contends for,—that the second period of running was not to be continued if the first period did not return \$75 a day, but that the first period was to be wholly run, whatever the amount of daily earnings might be, and that the deficiency, if any, was to be made up to the defendant before he could be required to begin the second period.

It is clear the second proviso cannot be so construed, for there is no third period of which it can be said that it shall not be commenced, unless the deficiency of the second period is first paid ; and therefore the second period, it would seem, is not *to be continued* unless the gross earnings are not less than at the rate of \$75 per day during that period.

As this is the meaning of the second proviso, as applicable to the second period of time, the same construction should be placed upon the first period, as applicable to the first period of time. The first period of time should be construed as if the first proviso immediately followed it, and as if the second period of time did not stand between them.

That this is the proper construction is also clear from the third proviso in this clause of the agreement,

“that upon Thompson paying up any deficiency in said rate of \$75 per diem, which shall be optional with him, he may require the said vessel to continue her running during the said period.”

The whole agreement shews it was not intended to run the vessel at a loss to the defendant, taking \$75 per day as the paying rate. If, however, the receipts were less than that sum, he could not call on the plaintiff to make it up. The plaintiff might choose to make it good to the defendant, but it was to be optional with him to do it or not as it suited him. It would have been very hard then to have forced the defendant to run during the whole of the first period at a daily loss, when he had no claim on the plaintiff for indemnity, unless the plain language of the agreement was so expressed.

To tell him that he need not continue during the same period, because he had lost on the first, does not compensate him for his loss, and is not a good reason for reading the agreement as the plaintiff proposes to read it, unless it must be so interpreted.

I come to the conclusion that there is no difference between the defendant's construction of the agreement, as contained in his plea, and the plaintiff's construction of it, as he has set it out *verbatim* in his declaration; and I come to the conclusion also that the particular part of this agreement was not and is not an absolute engagement to run the boat during the whole period of six weeks, whatever the earnings might have been, but a qualified and conditional one, which entitled the defendant to stop running whenever the earnings fell below \$75 per day. I say entitled the defendant to stop when the earnings fell below \$75 a day; but that must be considered along with the right which the plaintiff had “to pay up any deficiency in that respect, and to require the vessel to continue her running during the same period.”

Neither party argued this point, but it gives rise to the important question whether the defendant could stop without notice to the plaintiff of there being a deficiency,

and that he would stop unless the deficiency were paid to him, or that he had stopped running the boat on account of the deficiency, so as to have afforded the plaintiff an opportunity of exercising his option to pay the deficiency, and to continue the running.

The defendant was not bound to stop whenever a deficiency happened: he was running for his own benefit; and because he sustained a loss on one day, it did not follow he would stop if he had the prospect of making a sufficiency upon every other day, or upon nearly every other day, during the season. In the ordinary course of things, he would not stop because of one day's loss, if the probabilities were that in the whole season he would make a profit.

The fact of not making as much as \$75 per day was a matter peculiarly within his knowledge: it was in no way within the plaintiff's knowledge.

Then the election to continue the running of the boat, notwithstanding a loss, lay with the defendant. He was not compelled to stop because she did not pay. If he elected to stop, I think he should have notified the plaintiff, that he might have elected whether he would require her to continue running, by his paying the deficiency.

The rule is that a matter which lies particularly within the knowledge of one party must be notified to the other party, to create a liability against him.

Here the defendant was to run the boat for a particular time, provided the gross earnings were not less than \$75 per day; and as the defendant was to do this, and was the one to receive the earnings, it seems like those cases in which it was held that notice was necessary to be given; as on a promise to pay all the plaintiff's costs in such a suit, or his damages sustained by a battery; or to pay him as much for an article as he had got from any other person; for these and such things lie most properly in the cognizance of the plaintiff: *Hardr.* 42.

The plaintiff could not tell whether the defendant was receiving from *unknown* and *many* persons as much as \$75 a day, though he would be obliged to take notice, at

his peril, if the defendant received that amount from a *particular* person who was named in the agreement: *Henning's Case* (Cro. Jac. 432); *Com. Dig. Pleader*, ch. 73, 75; *Pennant's Case* (3 Co. 64 b).

The defendant should, therefore, I think, have notified the plaintiff that his gross earnings were not as much as \$75 per day, to have enabled the plaintiff to exercise his option of paying the deficiency and of requiring the boat to continue her running.

As it was, the plaintiff had no means of knowledge or notice of the insufficient earnings, and the running was discontinued without the opportunity of getting the benefit of his contract.

The whole facts, too, show that the plaintiff should have had such notice, for otherwise the defendant after his first day's running might lay up the boat, because the earnings were not on that day as much as \$75, and yet retain the \$2000 absolutely for his own use, while the plaintiff was in perfect ignorance of the condition of things, and was without the opportunity of helping himself.

The different provisoes contained in the fourth section it was not necessary for the plaintiff to notice in his declaration: *Simpson v. Ready* (12 M. & W. 367); *Mayor of Salford v. Ackers* (16 M. & W. 85). The defendant has rightly pleaded the one he relies on in his second plea, and the question is whether he should have averred in that plea that the plaintiff had notice of the deficiency, and I think he should, for the plea does not appear to be a perfect defence to the contract without the allegation of notice. All the plaintiff knows is that defendant did not run the vessel for the stipulated time: he does not know why he did not. The defendant knows the reason, but he does not communicate it, although he knows the plaintiff had the option of requiring the vessel to continue running.

The plaintiff might have replied no notice, but I think he was not bound to do so, as the defendant was not justified in stopping without notice, to have enabled the plaintiff to continue the running without stoppage at all.

The plaintiff is entitled to judgment on the demurrer to this plea, on the ground of its insufficiency in this respect, but not for the causes of exception which were taken and argued.

Then, as to the assessment of damages. The agreement states that the defendant should retain for his own use the \$2000, "subject to the stipulations following," and the very next stipulation is that he would run the vessel as before stated. Now if he did not run the vessel, is he to retain the whole \$2000, although it was paid to him subject to the condition of his running it?

The rule of damages, as stated in *Hadley v. Baxendale* (9 Exch. 341); *Smeed v. Foord* (1 El. & El. 613); *Gee v. The Lancashire &c. R. Co.* (6 H. & N. 211); *Wilson v. Lancashire, &c. R. Co.* (9 C. B. N. S. 632); *Borries v. Hutchinson* (18 C. B. N. S. 445); is, "that the party ought to receive such a measure as arises naturally from the breach itself, or such as may be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach;" and, as the parties can expressly bargain what the measure of damage shall be in a given event, as where they declare that a certain sum, in case of a recovery, shall be considered as stipulated and liquidated damages, and not as a penalty, so it is only reasonable to give as full an effect to their implied and contemplated arrangements as to their positive contracts.

Now here, as \$2000 were paid to the defendant for running his boat for a particular period, having all daily loss made up to him, there can be no better measure of damages taken, and no other measure was probably in the minds of the parties at the time, than that, if so many weeks running were worth \$2000, so many weeks less running should be estimated at the same rate.

According to the defendant's argument, the defendant could have kept the whole \$2000 and never run his boat at all, and the plaintiff could recover no greater damage than 1s., unless he proved actual damage sustained by the breach of contract.

The answer is, the parties have, as they may, by the nature of their agreement, arranged that the damages should be in proportion to the time not run, at the rate to have been paid for the whole period, and this was the mode claimed at the trial by the plaintiff's counsel, and which has been submitted to us to say whether it is sustainable in law, and we think it is.

The rule should, therefore, be, if no amendment be allowed, to increase the damages to \$896 66, that is, to \$1666 66 less \$770, for the plaintiff, and that judgment be entered for the plaintiff on the demurrer to the second plea. But, we think, as it is very possible the plaintiff had notice in fact of the stoppage of the boat for the cause alleged, that the defendant should be allowed to amend his plea, by alleging notice as aforesaid; on his filing an affidavit of the plaintiff having had such notice in truth; and this amendment should be without the costs of the argument on demurrer, because neither party raised the point of notice before us, but the defendant should, as a condition precedent to the amendment, pay the costs of the day of the trial.

Judgment accordingly.

HAYNES V. COPELAND ET AL.

*Local improvements—By-law good on face—Distress for rate levied—
Replevin.*

The by-law of a Municipal Corporation passed in 1865, for the purpose of authorizing the levying of a rate for certain local improvements, in the shape of the pavement of sidewalks, after reciting some previous resolution of the Council accepting a tender for the work, and authorizing the passage of a by-law to levy a certain rate per foot frontage on the owners of real estate on the parts of several streets named, and that the required sum should be raised by local taxation *upon the proprietors of the several lots of land adjoining said sidewalks immediately benefitted thereby*, "except that part on James Street opposite the Market Place, and those parts on Church Street opposite the several churches and school-houses;" and that the persons named in the first column of the schedule annexed to the by-law were proprietors of the lands adjoining said sidewalks, not before excepted, and

were immediately benefitted thereby; and that the whole of the said property so benefitted was by the assessment roll of 1865 rated at \$12,554, &c., &c.; provided that there should be raised from said proprietors 22½ cents in the \$, and that the collector for 1865 should collect the rate in the usual way. It then went on to repeal a by-law of 1864, authorizing the levying of the frontage-rate above referred to. The work in question had been begun, finished and paid for in 1864, with the exception of \$659, which were paid before the passage of the by-law of 1865. It further appeared that persons were rated as proprietors, whose names did not appear on the assessment roll, and that all the streets affected were grouped together and rated at the said sum, instead of being assessed separately. There was the further fact that the whole of plaintiff's property at the corner of two streets was assessed, whereas the flagging extended only over a portion of it:

Held, that the by-law contained nothing objectionable on its face, because it appeared to be only for prospective work, and that therefore on the authority of *Jones v. Johnson*, 5 Ex. 861, an action would not lie against defendants (the collector and his bailiff) for enforcing the rate; that the proper course was to move to quash the by-law, and if quashed, then to proceed against the Corporation. But, *Held*, that assuming the by-law to be defective in providing for a debt of the previous year, it was merely providing in 1865 for a debt contracted and provided for by the by-law of 1864, but provided for imperfectly, which, *Semble*, was not a violation of the rule against retrospective debts, but a mere repeal of a defective, doubtful, or invalid rate, imposed within the jurisdiction of the Council, for another free from all objection.

Held, also, that it was no objection to the by-law that certain proprietors were rated for the special rate, who were not on the general assessment roll; nor that the assessment value of 1864 was taken instead of that of 1865, as this did not appear on the face of the by-law and could not therefore be taken in this action; that as to the exception in favour of church and school property, under sec. 8 of the Assessment Act such properties were clearly exempted from local taxes; and that as to grouping the streets together, this also was plainly no objection on motion to quash the by-law, and therefore not open to plaintiff in this action.

Held, also, that the whole of the plaintiff's property, as assessed, was liable, though the flagging extended over a portion only, as no doubt the whole was benefitted by the partial improvement.

Held, therefore, that plaintiff's goods were properly distrained upon for the non-payment of the rate, and that *replevin* at his suit would not lie against defendants.

SPECIAL CASE.

Replevin for seizing the plaintiff's goods.

The facts were that in 1864 and 1865 plaintiff, being a resident of the Town of St. Catharines, owned a dwelling-house and lot on the north side of King Street, another lot on the east side of Ontario Street, and a third lot at the corner of St. Paul and Ontario Streets, fronting on these streets.

The Town Council, under resolution, advertised for tenders for flagging the sidewalks of certain streets and stone-crossings. One Robinson tendered to flag the sidewalks at forty-eight cents per running foot, and stone-crossings at fifty-two cents per running foot.

The Council by resolution accepted the tender, and directed the committee on by-laws to prepare a by-law levying a rate of fifty cents per foot frontage on the owners of real estate on parts of the following streets, namely, Ontario, &c., for stone-flagging.

On the 16th of May, 1864, the Council entered into a contract with Robinson for the performance of this work. Nearly all the work was done by the 21st November, 1864, and it was all done early in the December following.

The price of the work was \$4069.22, which was paid in 1864, with the exception of \$659, which latter sum was paid before August, 1865.

On 21st November, 1864, the Council passed a by-law imposing a frontage tax of fifty cents a foot upon the several owners of the lots of land adjoining the sidewalks flagged, which was repealed by the by-law of the 14th August, 1865.

No special assessment was made at any time of the property to be immediately benefitted by the improvement of the sidewalks.

On 14th August, 1865, a by-law was passed by the Council to raise by local assessment \$2,817.95 for the purpose of paving certain sidewalks in the town.

The resolutions before mentioned were recited in it, and that the necessary sum should be raised by local taxation *upon the proprietors of the several lots of land adjoining the said sidewalks immediately benefitted thereby*, "except that portion on James Street opposite the Market Place, and those parts on Church Street opposite the several churches and school-houses;" and it was also recited, that the persons mentioned in the first column of the schedule annexed to the by-law were proprietors of the lands adjoining the said sidewalks, not before excepted, and were

immediately benefitted thereby; and that the whole of the said property, excepting as aforesaid, immediately benefitted by the making of the pavement and flagging, was by the assessment roll for the year 1865 rated and assessed at the sum of \$12,544, and that it would be necessary to raise for the work \$2,817.95 by rate upon the said proprietors of the said real estate; and that for such purpose it would be necessary to raise a rate of twenty-two-and-a-half cents in the dollar on the assessed value of the properties in the schedule named, being the real properties immediately benefitted; and that each of said proprietors was liable to be rated and to pay the sum set opposite his name in the third column of the schedule to the by-law.

Then the Council enacted that there be raised from the said properties the sum of twenty-two-and-a-half cents in the dollar, as aforesaid, and that the collector for the year 1865 should collect the said taxes in the usual manner under a separate column in his book, to be inserted for that purpose; and that the by-law of 20th of November, 1864, should be repealed.

The case then shewed that four churches and two public schools were not contained in the schedule in which the owners of properties to be taxed were named.

The plaintiff was assessed for his lot on the east side of Ontario Street..... \$22 50

For his lot at the corner of Ontario and St. Paul Streets 135 00

And for his lot on the north side of King Street 90 00

making in all the sum of..... \$247 50
to be paid by him under the by-law.

The valuation of the properties was the valuation for ordinary assessment purposes made for 1865; but some of the properties named in the schedule to the by-law were not rated against those who were rated for them in the general assessment rate, but to others.

The only property mentioned in the by-law of 1865

was the land *adjoining the sidewalks on which the stones were laid.*

On the property of the plaintiff, at the corner of Ontario and St. Paul Streets, twenty-two feet of stones were laid at the side and near the rear of the lot, and the value of the whole property was assessed for such portion.

The collector received the roll on the 18th September, 1865, but he did not demand payment of the taxes until fifteen days before he levied, when he duly demanded the same, and because they were not paid he levied on the 29th March, 1866, on the goods of the plaintiff for the money charged against him on the by-law.

The Town Council from time to time extended the time of the return of the collector's roll, and Copeland, one of the defendants, was collector for the years 1865 and 1866.

The questions for the opinion of the Court were :

1. Whether the by-law of 14th of August, 1865, upon the facts stated, was valid ?

2. Whether the Corporation of the town had a right to rate and value the whole of the plaintiff's lot on the corner of St. Paul and Ontario Streets in making the assessment for the local rate, while the flagging extended over part only ?

3. Whether the defendants under the facts were justified in making the seizure of the plaintiff's goods ?

If the Court should decide in the negative, judgment was to be entered for the plaintiff for 1s. damages, and costs of suit; if in the affirmative, judgment of *non pros.*, with costs, to be entered for defendants.

S. Richards, Q. C., for the plaintiff, cited C. S. U. C. ch. 54, sec. 338, sub-secs. 1, 2, sec. 279, sub-sec. 2, sec. 279, sub-sec. 2, sec. 222; ch. 55, sec. 8; 12 Vic. ch. 81, sec. 81, sub-sec. 5; 22 Vic. ch. 40, ch. 99, sec. 324; *Mellish v. The Corporation of Brantford*, 2 C. P. 35; *McCutcheon v. The City of Toronto*, 22 U. C. R. 613; *Moore v. Hynes*, *ibid.* 107.

Robert A. Harrison, Q. C., contra, referred to C. S. U. C.

ch. 54, secs. 222, 338, 202, ch. 55, sec. 8, sub-secs. 3-5, secs. 89, 90, 91, 93, 96, 104, 105, 173, 177; *Aldwell v. The City of Toronto*, 7 C. P. 104; *Aldwell v. Hanath*, 7 C. P. 9; *King v. Burrell*, 12 A. & E. 460; *Hunt v. Hibbs*, 5 H. & N. 123; *Wilson v. The County of Middlesex*, 18 U. C. R. 348; *Black v. White*, 18 U. C. R. 369; *Smith v. The City of Toronto*, 7 U. C. L. J. 239; *Carmichael v. Slater*, 9 C. P. 423.

A. WILSON, J.—It is admitted that sec. 338, sub-sec. 1, of the Municipal Act, ch. 54, is the only provision applicable to this special improvement, and by that enactment the Council of St. Catharines had power to pass a by-law “for assessing and collecting from the proprietors of real property immediately benefitted, by making or repairing any pavement in any public way or place, near to such property, such sums as may be necessary for so making or repairing the same.”

Then sec. 8 of the Assessment Act, ch. 55, provides “that all municipal, local or direct taxes or rates shall, when no other express provision has been made in this respect, be levied equally upon the whole ratable property, real and personal, of the municipality, or other locality, according to the assessed value of such property, and not upon any one or more kinds of property in particular, or in different proportions.”

The by-law of November, 1864, was repealed, because it was thought not to be valid, by reason of its imposing a rate according to the frontage of the property. The section of the Assessment Act just mentioned shews what the general mode of assessment is which must be adopted, when no other express provision has been made in this respect. The express provision which is referred to in the above section of the Municipal Act is, by “assessing and collecting from the proprietors of real property, immediately benefitted,” &c.

The *proprietors* are therefore to be assessed; but how assessed? The course adopted by the Council in the by-law of 1864 was by imposing a rate of fifty cents a-foot,

according to the frontage measurement of the respective properties benefitted. It was probably as just a method as by rating the proprietors upon the assessed value of the property. In each case the charge would fall upon the proprietor: *ex parte Aldwell* (7 C. P. 109); *Moore v. Hynes* (22 U. C. R. 107).

This case of *Aldwell* did not determine that a frontage rate was bad in itself, but only that it was not the proper mode of rating when the Statute had required it to be by the imposition of an annual rent.

We do not require to deal with this at present, as the by-law was repealed which provided for a frontage rate, and the one of 1865 passed which placed the assessment on the valuation of the property.

The first question submitted is, whether the last by-law is valid on the facts stated.

The objections raised to it are—

1. That it provides for raising \$2,817.96 in the year 1865, while only the sum of \$659 remained due by the Corporation to the contractor at the end of 1864, and the whole of this remaining sum was paid by the Corporation before the passing of the by-law at all; and as to what was payable in 1864, was a debt of that year, and cannot lawfully be levied for by a rate in the year 1865.

2. That the assessment value for the year 1864 should have been taken and not the value of 1865.

3. That *all* the property benefitted should have been rated, and the exemption of churches and schools was therefore illegal.

4. Persons have been rated as proprietors, whose names do not appear on the assessment rolls.

5. Each street should have been assessed by itself, and all the streets should not have been grouped together and rated at the like sum.

The case of *Mellish v. Brantford Town Council* (2 C. P. 35) did not decide that a Municipal Council could not pay a debt justly contracted and payable in one year by a rate to be levied in a subsequent year; but that a Muni-

icipal Corporation was not bound in a subsequent year to pay a debt due in such subsequent year under a by-law passed in a previous year creating the debt, but which provided no special rate for the liquidation of the debt.

The by-law was held to be illegal, because it created a debt not payable within the year it was passed, and yet imposed no special rate for payment of that debt when it fell due; and although the by-law, which was passed in 1850, was due on the 1st day of January, 1851, the Court said if it were held to be valid, that a by-law payable ten years after would be equally valid, though no special rate were provided, and the whole policy of the Statute would be frustrated.

The Court, however, expressed a very strong opinion that the debts of a former year could not be imposed upon or paid by the Council of a subsequent year, as the rule was that rates could not, unless by the express authority of an Act of Parliament, be made to apply retrospectively, citing among other cases *Woods v. Reed* (2 M. & W. 770).

The provision on the subject is contained in sec. 222 of the Municipal Act (ch. 54): "The Council shall assess and levy on the whole ratable property within its jurisdiction a sufficient sum in each year to pay all valid debts of the Corporation, whether of principal or interest, falling due within the year."

In *Jones v. Johnson* (5 Exch. 862), which was an action of replevin, it was considered that a rate not appearing on the face of the proceedings to be a retrospective one, though retrospective in fact, was not necessarily objectionable; for if it were imposed *bonâ fide*, by reason of "the prospective estimate falling short of the demand upon it, or of persons failing to pay the rates, or the rate proving unproductive from some other cause," it would be sustainable, for it was impossible to guard against all such matters; and it was also decided that if the Council were wrong in making a retrospective rate, no advantage could be taken of that fact in an action against the magistrates who enforced the rate by distress.

In *The Attorney General v. Church* (2 H. & M. 697) the language of V. C. Wood is very emphatic against the right of bodies, exercising such public powers, to throw the payment of debts of the one year upon those who may be liable to pay the just debts of the locality in a subsequent year.

In *Regina v. St. Michael's, Southampton* (6 E. & B. 807) the resolution of the vestry to make certain alterations and to borrow was passed in June, 1826. The resolution to accept the contract of Messrs. Foot and Hayter, to do the work for £2,300 and to borrow £2,000 on the rates, was made in December, 1826. The consent of the Incumbent and Bishop was given early in 1827. The work was done between June, 1826, and the 29th of March, 1830, and the bonds were given by the Churchwardens, 27th of March, 1830, "not for money lent by the contractors, but solely in payment to them of the debt which had been so due and owing since a time previous to the 27th of March, 1830."

The Court considered a bond given for £400 of the contract price was in effect a loan to pay not a past debt, as described in *Rex v. Dursley* (5 A. & E. 10), but a present debt as soon as it became due, and it was due to the contractors when the bond was given.

It was, also, argued that the creditor could not recover, because he had not claimed the money when the bond became due, but had let it lie over, receiving the interest upon it yearly, and that different persons were thus called upon to pay their share, who should and would have paid if the creditor had called for his money at the time it was due; but the Court said the Statute did not require that this should be done by the obligee, though "in case of future legislation justice towards the future ratepayers seemed to require that the bond should require the obligee either to enforce payment of part of the principal annually, or to lose it; and *Rex v. Carpenter* (6 A. & E. 794) laid down that the obligee was not under a duty to compel the parish officers to make an annual provision for the reduction of the principal."

There may be difficulty in some cases in providing for past debts; but it is quite clear if the creditor need not ask for his money when it is due, or, at any rate, if he cannot compel the annual raising of his instalment, though it is not then payable to him, the ratepayers of a future year are made to pay directly debts contracted by and which should have been paid by their predecessors.

The proprietors in this case, being chargeable, and not the *occupiers*, makes it a more favourable case for a retrospective rate, as was said in 2 H. & M. 697.

It is said a Corporation may be justified in incurring a debt to oppose legislation prejudicial to its rights or interests: *The Attorney General v. The Mayor of Wigan* (18 Jur. 299); and if such costs were not paid in the year the debt was incurred, because not foreseen and so not estimated for, it might, I have no doubt, be properly discharged by a retrospective rate.

The general rule and principle of law, that such bodies ought not to levy by rate to pay past debts, is a good and beneficial one; but it does not seem to be so inflexible as it has been contended to be. The inhabitants or ratepayers of a locality for one year should not be required to pay for the benefits which the inhabitants and ratepayers of a previous year enjoyed. Each year's debts should be paid by that year's assessments, unless in those expressly authorized cases where a deviation is allowed by Statute.

This by-law contains nothing objectionable on its face, because it appears to be only for prospective work, and therefore, according to the case of *Jones v. Johnson*, an action will not lie against the defendants for enforcing the rate, and if the proper remedy be to quash it if illegal, or irregular, and that has not been done, an action will not lie on the assumption that it is illegal: *Birmingham v. Shaw* (10 Q. B. 868); *The Lancashire R. W. Co. v. Heaton* (8 E. & B. 952); and it is right it should not, for the direct course was to make application to quash the by-law, and if it were quashed, to proceed against the Corporation alone: ch. 54, sec. 202.

The fact of the by-law being one for local municipal purposes did not, I think, confer upon the Corporation any greater power to charge retrospectively than on a general assessment over the whole municipality : the reason which forbids it in the one case must apply with as much force in the other case.

The debt here may, perhaps, not even as a matter of fact, be a debt which was incurred in 1864, and improperly put over till 1865 ; for in the former year a by-law was passed for the same work, imposing a frontage tax, which remained in force until the by-law in 1865 was passed, which repealed it and imposed the rate by valuation ; and I see nothing which determines that when the general mode of taxation is not adopted, that is, when real *and personal property* under ch. 55, sec. 8, are *not* to be assessed, that a frontage rate is not as valid as a valuation rate for this local work.

And yet even if the first by-law were bad, it still was not a debt which was improperly or purposely put over to another year ; but assuming the by-law to have been defective, it was merely providing in 1865 for a debt contracted and provided for by the by-law of 1864, but provided for imperfectly, and I do not see quite plainly that this is a violation of the rule against retrospective debts : it is repealing a defective, doubtful, or invalid rate, imposed within the jurisdiction of the Council, for another free from all defects, though I confess that much may be said with great force against it.

Nor am I satisfied, where the names of the persons to be rated are scheduled, and no objection is made or appears that they are different from those who were liable in the previous year, that it is any objection that all the debt was not levied from them in the previous year, but part only in the one year, and part in the other, so long as no greater burden has been cast upon them by such divisional payments than if the whole payment had been made at once.

Now, there is no objection of the kind at all. The only objection made is that "some of the properties named in the schedule to the by-law were not rated against those

who were rated for them in the general assessment roll, but to others; and this does not point even to anything of an objectionable nature. The question is, whether the real proprietors for the special rate in 1865 are the same real proprietors who were liable for or paid any part of it in 1864; and they might have been so, although not named in the general assessment roll as such. The general assessment roll for 1864 might have been completed before the local improvement was fully estimated or provided for, or the general assessment roll might have been erroneous, or there might have been many other reasons why the names in the general roll of 1864 were not altogether the same names as the actual real proprietors of 1864, who were scheduled for this local improvement. That the assessment value for 1864 should have been taken instead of the assessment value of 1865 is an objection which, not appearing upon the face of the by-law, cannot be urged against it on this proceeding.

Then, it is said that the exemption of church and school property from this local improvement tax avoids the by-law, by destroying the equality of the charge; and that this objection does appear on the by-law.

The defendants contend that as church and school property are exempt from all taxation, such property is necessarily exempt also from local improvement rates.

The eighth section of the Assessment Act is the one above mentioned, which provides how, in the absence of any express provision to the contrary, "all municipal, *local* or direct taxes or rates are to be levied."

Then section nine provides that "all land and personal property shall be liable to taxation, subject to the following exemptions * * "; so that *local* assessments were distinctly before the Legislature when these exemptions were framed, and among such exemptions are, 3. "Every place of worship, church-yard or burying-ground."

5. "Every public school house, town or city hall, court house, gaol, house of correction, lock-up house, and public hospital, with the land attached thereto, and the personal property belonging to each of them."

There is no reason to suppose that the Legislature made any distinction in these exemptions between assessments for general and for local purposes. It was not thought decent to tax a place of worship, or a burying-ground; and if the gaol and public hospital are free, as they manifestly are, and were intended to be, the public school house must be free too, for they are all classed together in the same section.

The last objection to the by-law is for grouping the several streets together mentioned in the by-law, and imposing a single rate on all alike, instead of a separate rate for each street. This, if an objection at all, is plainly one on motion to quash the by-law; for it is impossible the Court can say it is unjust in fact, and there is certainly nothing to shew it is wrong in law. Why should there be a separate rate? Because, it may be said, the expense may be not alike in each street, but may be twice as great in one street as in another; but we cannot tell this, and it is not in or by such a proceeding as this that such a question can be tried. We must presume the Council has correctly rated the respective streets and properties; and beside, the *benefit* is not to be measured by the outlay or work made or done just in front of or adjoining each particular property. The work that is done some distance off, perhaps, in another street, may have benefitted this plaintiff's property far more than the work done before his own door; and all these are matters of intramural policy and arrangement, which we cannot interfere with unless brought before us in the proper form, on a motion to quash the by-law for extrinsic causes. *Dorling v. The Local Board of Health of Epsom* (5 E. & Bl. 471) is very applicable on this point.

There is nothing on the face of the by-law which is objectionable, and nothing upon the facts stated which can make it invalid on a proceeding like the present. The first question submitted, then, must be answered in the affirmative. The second question is, whether all the plaintiff's property should have been rated at the corner of St. Paul's and Ontario Streets, while the flagging extended over part only. The proprietor is to be assessed for his property

which is immediately benefitted. Now, it may well be that the whole property is benefitted, though the work charged for may not have been done all along or in front of the property. A ravine might be filled up at one corner, or a swamp might be drained, or a hill cut down, which would benefit the whole property, though the particular part, which had the work done upon it, might not have been the one-tenth part of the property which was assessed for it. This has in fact been answered already: it was for the Council to consider and determine on this matter when imposing the rate. The cases of *The Justices of Bedfordshire v. The Commissioners for the Improvement of Bedford* (7 Exch. 658); *The Governors of the Bedford General Infirmary v. The same Commissioners* (7 Exch. 768), and the following case in fo. 777, are applicable to this part of the case.

The second question must be answered also in the affirmative.

The third question is, if the defendants under the facts stated had the right to seize the plaintiff's goods, which must be answered in the affirmative also, as may be gathered from what has been before mentioned, for, among other reasons, that this is not the proper method or proceeding for determining the validity of the by-law upon the exceptions taken; and because the defendants were justified in what they did while the by-law stands, and if it be quashed, *they* are not liable, but the corporation only. It is of no consequence then to determine whether the time for returning the roll was duly enlarged, or the defendants acted with perfect regularity.

It does not appear there is any greater right to contest the propriety of a rate in an action of replevin than in an action of trespass.

Jones v. Johnson, before mentioned, was an action of replevin.

The Governor, &c., of the Poor of Bristol v. Wait (1 A. & E. 264) was also replevin. There it seems to be admitted, upon the authority of cases referred to, that where a party

is rated who is not liable to be rated at all, or is rated for premises not in his occupation, or not lying in the parish, that trespass or replevin will lie, and the party is not bound to appeal against the rate, although that course is also open to him; but a person possessing personal property in a parish where he inhabits cannot treat a rate as a nullity which is assessed on his stock-in-trade, though he has no stock-in-trade, and though no other personal property but stock-in-trade has ever been assessed; because personal property being liable to be rated, the overseers could rate it, and if the rate were unfair or excessive, the party should have appealed against it, referring to *Marshall v. Pitman* (9 Bing. 595).

In *Le Fenore v. Miller* (8 E. & B. 321), which was also replevin, the Court held that a rate, which had not been published, was not void for the want of it, and not having been appealed from the officer, who enforced the payment of it, was protected: "Many particulars, many forms, are requisite to the perfection of a rate, which is usually made on many individuals: some are of more, some of less practical importance. If non-compliance in any one respect is to involve nullification of the whole rate, it is exceedingly difficult for the Court to make any distinction, and the greatest inconvenience may result. Suppose ten thousand persons are included in the rate, and there is an omission of one particular in a single instance, is the party who levies the rate to be a trespasser? No inconvenience follows from holding the other way; for if the defect occasions a grievance to any individual, he may appeal."

The Court is not bound to quash a by-law, unless it is illegal on its face: *Grierson v. The Council of Ontario* (9 U. C. R. 623).

If, in the present case, the pleadings had been carried out to their proper conclusion, they would have been probably in the following form: the count for taking the plaintiff's goods; a recognizance by the defendants, that they took the goods under a warrant of the collector to enforce payment of the special rate; a plea by the plaintiff that the

rate was imposed by a by-law, which was passed in 1865, for payment of a debt, which was contracted and which should have been paid in 1864; a replication that the rate was imposed for a local improvement under the 338th section of the Municipal Act, and a large portion of the rate, to wit, \$1251.27, were raised and paid in 1864, leaving \$2817.95 to be raised and collected thereafter, and in order to raise the same the by-law in 1865 was passed; a second replication that a by-law was passed on the 21st November, 1864, imposing a frontage rate, under which \$1251.27 were raised and paid, and that the Council in 1865, believing it to be expedient to change the mode of collecting the money, repealed the by-law of 1864, and passed another on the 14th of August, 1865, by which a rate, according to the assessed value of the property benefitted, was substituted for it, and under which last by-law the warrant was issued.

The plaintiff would probably, also, demur to the plea; because, notwithstanding the fact that the debt was contracted and should have been paid in 1864, there are many cases in which a Council, acting in perfect *bona fides*, must find it impossible to pay it; and I do not think it follows that the same strictness is applicable to a local special rate as to a general rate on real and personal property extending over the whole municipality. The question on a local rate would be influenced somewhat by the *bona fides* of the Council; and if there be any circumstances under which a valid by-law of this kind might be made, then the course to pursue was to move against the by-law on the merits, and not to try such matters in an action when its legality was not fairly apparent.

The rule will be that judgment now be entered for the defendants against the plaintiff.

J. WILSON, J.—The first question submitted to the Court is the legality of the by-law under all the facts recited in it and admitted in the special case. In the argument it was submitted that there should have been a special local assess-

ment of the property said to have been benefitted, that the parties might have had an opportunity to appeal. The authority for making this by-law is section 338 of the Municipal Act; sub-section 1: "Every town may pass by-laws for assessing and collecting from the proprietors of real property immediately benefitted, by making or repairing any pavement in any public way or place near to such property, such sums as may be necessary for so making or repairing the same; but this sub-section shall not apply to cities." When we refer to section 299, we find that cities may pass by-laws for ascertaining what real property will be benefitted by any proposed improvement, and the proportion in which the assessment is to be made on the various portions of the real estate so benefitted, subject to an appeal to the County Judge, as in an appeal from the Court of Revision in the case of an ordinary assessment. Then follows the authority to make by-laws for assessing and levying upon the real property to be immediately benefitted, for paving, &c., but this can only be done on the petition of at least two-thirds in number and one-half in value of the real property owners, &c.

In case of towns, this authority is limited to making or repairing any pavement, and is not controlled by any provisions; but in case of cities it is not confined to pavements, but to other things, and is subject to provisions which do control the authority. We think the by-law is not bad for want of providing for a special assessment in respect to the money to be levied under it.

It is contended that the by-law and the facts admitted shew that it was not confined to the property immediately benefitted. The assessment on the plaintiff's whole lot on Ontario and St. Paul Streets is \$135; but on the lot only twenty-two feet of stones were laid, at the side and near the rear of it; and this, as we understand the admitted value of the work, would not exceed \$11. This appears unjust, and is no doubt a hardship, but with the question in this respect we cannot deal. It shews the wisdom of the provision in regard to cities, compared with towns. A rate per foot, on the

frontage paved, would appear a more equitable mode of assessment, but it has been held in *Aldwell v. The City of Toronto* (7 C. P. 104), that the Act does not authorize this mode. Nor as regards towns does it authorize the apportionment of different parts of the same property. If the pavement is partly opposite or near the property of the plaintiff assessed, we cannot say, although it be at the back and side of it, that it is not immediately benefitted. Indeed, the words of the sub-section are wide enough to authorize an assessment, if the pavement were not opposite, but only near to any public way or place which was paved. Nor can we see how it was possible for the Council to have exercised any distinction by other than arbitrary authority as to what proportion of the property had been benefitted or not by the pavement. The value of the paving was uniform; but it is not in the nature of things that an assessment could be so under this law; for if a given lot of 100 feet, without a house, or with an inferior one, worth \$500, and if half this quantity of land, with a house worth \$10,000, were assessed, the sum each would have to pay for the same quantity of work would be greatly out of proportion; yet it is by this mode that assessments of this kind are to be made.

It is objected that this by-law groups streets, which the Act does not provide for. The by-law shews that the Corporation determined to lay down flag stones, that is, to pave certain streets and street-crossings which are mentioned in it. These streets are public ways, and the Act authorizes the paving of them, and the assessment and collection from the proprietors of real property of such sums as may be necessary. What reason can there be for saying that there should be a by-law for every street? If the amount of work had been different in the different streets, or if the value of it had been different, there would have been force in the objection; but the case shews that the work and prices for it were the same in all the streets. I think the by-law is not open to this objection.

It is further objected that the church-ground, opposite to

which the pavement was laid, ought to have been assessed ; for although church-ground is not liable to assessment for general purposes, it is so for local work like this. We fail to see how this objection is open to the plaintiff ; for as we read the by-law, the work done opposite the churches has not been charged upon the property of the proprietors in the streets in which the churches are situated. But if it were otherwise, section 9, sub-section 3, of the Assessment Act, exempts every place of worship, church-yard, or burying-ground from taxation.

It is further objected that the assessment was not made in the same year the expenditure was incurred, and that the Corporation had no authority to levy it afterwards ; and the 222nd section has been referred to as supporting this proposition. The words are, "The Council * * * shall assess and levy on the whole ratable property within its jurisdiction a sufficient sum in each year to pay all valid debts of the Corporation, whether of principal or interest, falling due within the year."

Suppose a valid debt were incurred in one year, and the Corporation omitted to levy it in that year ; does it become a less valid debt the next year ? Is the debt paid or the duty extinguished by reason of the omission ? This case refers to a by-law which had been repealed, and in the argument it seemed to be conceded that the by-law charged each property with a rate per foot frontage, which the law did not authorize, as we already have had occasion to point out. If this work had been done and paid for as part of the general expenditure of the town, and afterwards levied under color that it was local, we should not have been prepared to uphold it ; but the case discloses that in its inception and all along it was treated as a local work, the expenditure for which was to be levied upon the locality.

It is said that there are now other persons on the assessment than would have been upon it if the assessment had been made when the work was done. Suppose it so ; in what way it changes this plaintiff's liability we fail

to discover. The assessment is upon all the real estate within the locality, and it can make no difference to any one in whose name the property is assessed.

We think the case discloses one of hardship upon the plaintiff; for the amount, for which he is assessed upon the lot opposite to which there is only a small part of the pavement, seems out of all proportion to the benefit conferred; but from this we have no power to relieve him. Practically, it has been found that no law of this or perhaps any kind has ever been framed that did not work a hardship somewhere. We can but regret that it is so.

On the whole, we see no ground for holding the by-law insufficient on any of the objections urged against it.

But the case discloses that the defendant Copeland, being collector for 1865 and 1866, got the collector's roll for 1865 on the 18th September, but did not demand these rates till the 14th day of March 1866, and levied on the plaintiff's goods on the 29th day of the same month. The Town Council having, but the County Council not having extended the time for returning the roll, while he had the roll, and the time extended, when the levy was made, we think it made no difference that the County Council had not extended the time.

RICHARDS, C. J., concurred.

Judgment for defendants.

ANGLIN, v. MINIS.

Replevin—Distress for taxes—Goods distrained off premises assessed—C. S. U. C. ch. 55—Previous occupant assessed—Liability of future occupant, though no demand—Pleading.

Held, on demurrer to the plea and avowry set out below, and reversing the judgment of the County Court, that the goods of a future occupant, who took possession of premises after assessment, and was in possession before the return of the Collector's roll, were liable to distress for taxes assessed in respect of the premises against the previous occupier; and that a demand upon him before distress was not necessary, as the Collector had already made one on the previous occupier, which was all that the Assessment Act required.

Held, also, that the goods were liable to be distrained, though they were not at the time on the property actually assessed.

APPEAL from the County Court of the County of Frontenac.

Replevin for taking a quantity of lumber on a certain wharf, in the City of Kingston, and detaining the same.

Avowry, that defendant was Collector of Kingston in 1866; that one William Anglin was assessed, in the Collector's Roll, as *occupant* of certain ratable real property, situate in Cataraqui Ward, in Kingston, at the annual value of \$30, and the rate of 24c. in the dollar was to be levied and collected thereon; and the avowry then alleged seven other assessments on the roll against the said William Anglin, as *owner* of certain other ratable real property, situate in the said ward, for different sums, upon which the rate of 24c. in the dollar had to be respectively levied and collected; and that defendant, as Collector, duly demanded payment of said taxes from said William Anglin, the person taxed therefor on said roll, and fourteen days having elapsed from time of said demand without said taxes having been paid, defendant, having possession of said roll, as Collector, took the goods in the declaration mentioned, same then being in possession of said William Anglin, in City of Kingston, as distresses for said several taxes, and justly.

The second avowry was the same precisely as the first, excepting that, after the allegation of the demand on William Anglin, the person assessed, and the fourteen days

having elapsed without payment being made, the conclusion was, "defendant, having possession of said roll, as Collector, and plaintiff, then being a non-resident of said City, then being occupant of said mentioned properties, and a person who ought to pay said taxes, as such occupant, took said goods, in the declaration mentioned, as therein alleged, same then being in plaintiff's possession, and upon said properties, as distress for said several taxes due in respect thereof, and justly.

Plea, to first avowry, that the goods therein mentioned were not in possession of said William Anglin, as alleged.

Pleas, to second avowry,

1. That at time of distress plaintiff was not occupant of properties therein mentioned.

2. That goods in declaration mentioned were not at time of distress upon said properties in avowry mentioned.

Plaintiff also demurred to second avowry, on the following grounds:

1. That mere fact of plaintiff being non-resident of the City of Kingston, and occupant of properties in avowry mentioned, and the goods in declaration mentioned being in plaintiff's possession and upon said properties, formed no justification for the distress complained of and admitted.

2. From facts set forth, goods and chattels of plaintiff, no matter where found, or in whose possession, would not be liable for payment of taxes mentioned in avowry.

3. From facts set forth in avowry, plaintiff's goods and chattels were not liable to be and could not be distrained upon for taxes in avowry mentioned.

Defendant joined issue in demurrer to second avowry, and joined issue on plea to same. He also demurred to second plea to said second avowry, because it was not necessary goods of a future occupant should be on premises assessed at time of seizure to render them liable to seizure for taxes, it being sufficient if they were in his possession within the county or city.

Plaintiff joined issue in demurrer.

The learned Judge of the County Court gave judgment

for the plaintiff on demurrer to the second avowry, and also on the defendant's demurrer to the plaintiff's second plea.

From this judgment the defendant appealed.

The grounds of appeal sufficiently appear from the argument of counsel and the judgment of the Court.

J. A. Boyd, for the appeal :—

The two questions are, 1. Whether the goods of an occupier, not assessed, who takes possession of the premises after assessment, and is in possession before the return of the Collector's roll, are liable to be distrained on for the taxes assessed against the previous occupier in respect of the land.

2. Whether the distress can be made without a demand having been first made on the person distrained on.

[A demand was made on the person who was assessed, the previous occupant.]

There is also a third question ; whether the goods of the occupier, when the distress is made, can be taken in distress off the premises assessed.

The U. C. C. S. ch. 55, secs. 21 to 26 shew a *future* occupier may be compelled to pay taxes, and the new Assessment Act of 1866 is the same as the old one in this respect. The whole of these sections are consolidated from 16 Vic. ch. 182, sec. 7.

It is not necessary, to make the *future* occupier liable, that both the owner and the occupant should be assessed.

The Collector is to call on and demand payment from the person *taxed*: secs. 93 to 97, and secs. 102-3-5-6 ; and a *future* occupier is not such a person.

But sec. 96 shews a *distress* may be made on the goods of the person, " who ought to pay the same," wherever they may be found in the county.

Sec. 102 enables the taxes payable by *any person* to be sued for.

Then the oath of the Collector under sec. 106 shews that he is to be acquitted from further responsibility, only upon shewing that he has not been able to discover any goods

or chattels "belonging to or in the possession of the parties charged with or liable to pay such sums, whereon he could levy the same."

If there be any one of these sums sufficiently assessed and legally distrained for, the distress will be good, so long as the good distress is separated and separable by a different warrant, or by the amount of it being specially stated. It is not necessary that all the different sums distrained for should be supportable: *Holcomb v. Shaw*, 22 U. C. 103, per Burns, J.; *Smith v. Shaw*, 8 U. C. L. J. 297; *Skingley v. Surridge*, 11 M. & W. 503; *Corbett v. Johnston*, 11 C. P. 317.

The 27th Vic. cap. 19, sec. 3, which enables the arrears of taxes of a previous year to be added to the Collector's roll of a subsequent year, shews that the same person *who was assessed* is not the only person who is to be liable for the assessment when it has once been made: *Warne v. Coulter*, 25 U. C. 177.

In case of non-residents the demand of payment is not a condition precedent to the making of a distress: *DeBlaquiere v. Becker*, 8 C. P. 167.

The officer may be liable in damages for not demanding, but the distress is not illegal.

S. Richards, Q. C., contra:—

The persons, from whom taxes are to be demanded, are those persons who are named on the roll. If within the municipality, the demand is to be on the person taxed, or at his residence or place of business: if *not* resident within the municipality, the demand may be transmitted by post. The 97th sec. does not apply to such a case as the present, for this was not properly non-resident land: that term applies to the lands of persons who were not in the municipality when the assessment was made; whereas it appears that William Anglin, who was rated for the land, was in Kingston when it was assessed, and that it was assessed in his name.

If a *future* occupant can be distrained on, the goods taken must be the goods of the occupant, or of the party

originally assessed ; but sec. 24 shews that a *future* occupant cannot be distrained on, unless the owner and occupant both be assessed : *Warner v. Coulter*, 25 U. C. 177.

A demand of payment should have been made on the occupant before the goods were taken.

A WILSON, J., delivered the judgment of the Court.

In *Holcomb v. Shaw* it appeared the owner and the occupant were each assessed, and Mr. Justice Burns was of opinion the *future* occupant in such a case, under sec. 24, was a person "who ought to pay" the taxes under the 96th sec. No question arises here, as arose there, about distraining after the return of the roll. Here the roll had not been returned.

In *DeBlaquiere v. Becker* a demand for payment was held not to be necessary to be made on a non-resident, who was assessed, to legalise a distress for the arrears ; but this was under the 16th Vic. cap. 182, sec. 42, which has been altered by the Consol. Stat. ch. 55 sec. 97, which expressly requires the demand to be first made.

On this record it appears that William Anglin was assessed as *occupant* of one parcel of land, and as *owner* of several other parcels, in the City of Kingston, and that no other person was assessed in respect of them, as owner or occupier. It also appears that a demand for payment was made on William Anglin, and that after fourteen days from such demand, "the plaintiff, then being a non-resident of the city, then being the occupant of the said mentioned properties, the defendant took the said goods, then being in the plaintiff's possession and upon the said properties, as a distress, &c."

The authorities determine that if a distress be made for several distinct sums, and any one of them is and can be rightly distrained for on the particular property, the distress will not be illegal, although there may be one or more of the sums which could not lawfully have been distrained for.

Lands which are assessed against one, as *occupant*, may

be fairly assumed, for the purpose of assessment, to be made against him not as owner ; because land, whether occupied by the owner, or not occupied by him, is to be assessed against him, as owner, under the circumstances specified in secs. 21 and 22 ; and because the owner is put in contradistinction to the occupier in the Statute in these sections.

Non-resident land is properly described by secs. 23 and 31 as land of which "the owner is not resident, or is unknown, and has not requested to be assessed therefor, and which is unoccupied."

When the Collector proceeds to enforce payment, he is to deal with those whose names appear on the roll. If they are within the municipality he is to call upon them, or at their residence or place of business, and demand payment. If they are not within the municipality, he is to transmit to them by post a statement of the taxes charged against them in the roll, and demand payment.

This last provision, as to not being within the municipality, applies, I think, as well to the owners of non-resident lands, who have requested to be assessed, as to the persons who were residents at the time the assessment was made, and who were assessed as owners or occupants, but who have since removed from the municipality.

I am of opinion the 97th sec. does not apply to non-residents generally, as the 42nd sec. of the Act of 1853 did, which it consolidated. This last section provided generally, that after one month from the delivery of the roll the Collector might distrain on any goods and chattels which he found upon any of the land of non-residents, on which the taxes had not been paid ; while the consolidated provision is, that after one month from the delivery of the roll, and "after fourteen days from the time of *such* demand," the Collector may distrain any goods which he may find on the land.

This *demand* refers to the "persons who are taxed," under section 94, or to those "whose names appear on the Roll," who are not residents under section 95.

No demand was necessary under section 42 before dis-

training: *DeBlaquiere v. Becker* (8 U. C. C. P., 167). A demand must be made under the Consolidated Act; but no demand can be made on those non-residents who have not required they should be assessed; for they are not taxed, nor do their names appear on the roll, and therefore that which is now the 97th section, which was general to all non-resident lands before consolidation, extends to all non-residents whose names do not appear on the roll since then.

The further question is, whether, as it now excludes a large class of non-residents, by reason of the alteration referred to, it can be said to include that class of persons who were rated and resident at the time of the assessment, but have since then removed away; or whether, in fact, the not being *resident* within the municipality, under section 95, refers to the same class of persons, so far as realty is concerned, as in the case of the land of *non-residents*, under section 97, and I think it does.

The only difference between the two sections is, that section 95 applies to taxes due as well for personalty as realty, while section 97 applies to taxes due for lands only.

It may be, however, that taxes in such a case for personalty may be distrained for after a fourteen days' demand, while for realty it can only be as well after the collector has had the roll for one month as after a fourteen days' demand.

No doubt the 97th section reads very differently from what it originally was, but, as it stands, I am not prepared to say it does not apply to those not resident within the municipality who are mentioned in section 95.

If this be so, then the avowry under section 97 must be bad, for not alleging that the distress was made after one month from the date of the delivery of the roll to the Collector.

If the avowry can be considered as made under section 96, then the question is, whether the plaintiff, being the future occupant of the properties, was the person who ought to pay the same.

He was not assessed for the properties, nor did he own or occupy them at that time. He had nothing whatever to do

with them until after the Collector got his roll, and until after his demand was made upon Mr. Anglin for payment; nor was he ever asked for payment. He was certainly not the person who ought to pay the same, unless he is declared by the Statute to be such person; and this depends upon the earlier sections of the Act, 21 to 26, before mentioned. Mr. Anglin was assessed as occupant of the property, and as "owner" of seven others. The plaintiff, at the time of the distress, was the occupier of all these properties, though it is said, very strangely, he was at the same time a "non-resident of the city."

The 24th section declares that "when the land is assessed against both the owner and occupant, the Assessor shall on the roll add to the name of the owner the word 'owner,' and to the name of the occupant the word 'occupant,' and the taxes may be recovered from either, or from any future owner or occupant, saving his recourse against any person."

Does this mean that it is only when the land is assessed against both the owner and the occupier, that a *future* owner or occupier can be made liable?

If this be the meaning, the defendant must fail, for *both* owner and occupier were not assessed.

The way in which the 24th section is expressed would lead one to suppose that future owners or occupiers can alone be made liable, when both the owner and occupant have been assessed; but in my opinion that is not the proper construction to be placed upon that section. It should be read in connection with sections 22 and 23. From section 20 to section 26, inclusively, of the Consolidated Act, is copied from section 7 of the Act of 1853, and the words therein contained, "and the taxes therein may be recovered from either, or from any future owner or occupant, saving his recourse against any other party," had reference not to the particular case alone of owner and occupant being assessed together, but of either of them being assessed separately.

If they were both assessed, the taxes were to be recovered from either of them, and in every case if the owner or occupant did not pay, they were to be recovered from any

future owner or occupant. This is plainly the construction of section 7; for why were future owners or occupants to be made liable, when both owner and occupant were assessed, and not when the owner or occupant was singly assessed? In both cases the taxes were equally a special lien on the land, for which the land might be sold.

Why, also, should a *future* occupant be liable when his original assessed owner could still be resorted to? Or why should a future owner be liable when the original assessed occupant is still in possession, and of course liable? Either owner or occupant shall pay when both are assessed; and future owners and occupiers shall be liable in every case to pay saving their recourse against any other person.

The 13th and 14th Vic, ch. 67, sec. 7, is expressed as the Act of 1853 is.

This plaintiff was a future occupant of the lands in question, and became liable to be distrained on.

The question then is, should a demand have been made upon him for payment before the distress was made?

A demand was duly made on William Anglin, the person assessed, and the taxes were a special lien on the land.

If the Collector be required to make a fresh demand fourteen days before he can distrain, upon every change of ownership or of occupancy, he may be baffled forever; besides, he cannot tell whether there has been a change of ownership or not, though he might be better able to know of a change of occupancy.

No demand need be made by a landlord on a tenant before he distrains. Here the Collector complied with the Statute, by making a proper demand on William Anglin: after that there was no obligation upon him to make any other demand. There was no more necessity for a notice in this case than for a notice to a purchaser of old arrears, and in the latter case the Statute maintains the charge without registration: section 107. The Treasurer or Chamberlain's book is the place of reference to ascertain whether a person can or cannot safely take possession of, or purchase any property liable to assessment; and if the plaintiff has not

informed himself, when he might, of the state of this property, he has no one to blame for it but himself.

I think, then, the plaintiff was liable as a future occupant to the taxes in question, and that a demand upon him before distress was not necessary, as the Collector had already made one upon William Anglin, which is all that the Statute required; and that the distress upon this plaintiff's goods and chattels, whether upon the properties levied for the taxes or not, was such a distress as could be made by the Statute. I think the plaintiff was a person who ought to pay the same under the 96th section, taking the whole Statute together, and that any other goods in his possession in the city could be taken to satisfy these taxes.

If this be so, it is of no consequence that a distress was made on goods on all the properties for the whole taxes, instead of on the goods on each place for the taxes due only on that place, for all the goods were liable for the whole of the taxes.

If, however, the goods on each separate place were liable for the taxes due on that place only, and not for the other places, I should think the avowry bad: *Phillips v. Whitsed*, (2 El. & El. 804).

I have only to notice now the judgment of the learned Judge of the County Court, and the reasons of appeal. The learned Judge was under the impression that both avowries were demurred to, and he gave judgment against both of them, whereas the demurrer is confined to the second avowry only. The reasons for appeal or some of them take this objection; but as the oversight of the learned Judge is of no consequence in this respect, I have assumed throughout that the judgment was confined to the second avowry, and that the appeal is limited to the judgment given upon it. Of course, the formal judgment given in the Court below on the first avowry will be, as it ought to be, amended by the learned Judge, so as to make the record conformable to the actual state of the cause.

I think, also, from what I have already said, the goods in question, if in the plaintiff's possession, were liable to be

distrained for the taxes in question, although they were not on the properties already assessed, which entitles the defendant to judgment also on the demurrer to the plaintiff's plea.

The rule will be that the appeal be allowed, and that judgment be given in the Court below for the defendant on his demurrer to the plaintiff's plea, and on the demurrer of the plaintiff to the defendant's second avowry.

Judgment accordingly.

SMITH V. WALLBRIDGE.

Action for flowing back water—Real point in controversy—Amendment.

In an action for flowing back water upon plaintiff's land, on an objection raised by defendant at *Nisi Prius* as to the right, on the pleadings, to recover for more than so backing water on the plaintiff's land, as to interfere with the working of his mill, the Judge allowed an amendment of the declaration so as to test the right of defendant to overflow any portion of the land in question. Defendant at the time made no objection that this amendment would be letting in a matter which was *not* the real question in controversy, but merely insisted he could not then proceed with the trial, which was thereupon postponed. It also appeared that there had been several trials many years before between plaintiff and other parties, in which damages were claimed for flowing back on the land as well as on the mills, and it was not denied by the defendant that the question on the previous trial of this suit was the right to overflow the land at all, nor that the objection made at the second trial, when the amendment was applied for, had never been before raised, though there had been three entries of the record for trial and two references to arbitration between the first trial and the last entry of the record :

Held, that the amendment had been properly made.

In Michaelmas Term last, *C. S. Patterson*, on behalf of the defendant, obtained a rule *nisi* on the plaintiff to set aside the order of the Chief Justice of this Court, made at the Assizes at Belleville in October last, allowing the plaintiff to amend his declaration, by adding such words as he should be advised, so as to claim his rights in respect of flowing back water on any part of lot No. 11, in the first concession of Tyendinaga, and to claim as owner of the fee of said lot, on the ground that it allowed the plaintiff to set up a cause

of action different from that declared upon, and deprived the defendant of the benefit of the time which had elapsed since the commencement of this suit, as a bar to such new cause of action, and was not necessary for determining in the existing suit the real question in controversy between the parties; or to vary the said order, upon the same grounds, by permitting the plaintiff to claim as owner of the fee of only so much of said lot as was occupied by his mill, or so as to confine his complaint and his allegation of right to the impeding or injury of his mill by the flowing back water on the said mill, or on that part of the lot occupied by the mill, and to such claim of right only as was necessary for that purpose; also, further to vary said order, by imposing on plaintiff the terms of paying the costs of the day at said Assizes, or by making them costs in the cause to defendant only; the plaintiff or his attorney to bring into Court the *Nisi Prius* record, for the purpose of having the said order cancelled or varied.

In Hilary Term last, *John Bell*, Q. C., [of Belleville,] shewed cause:—

Defendant claims the right to flow the water of the stream back on plaintiff's land to the level of the water-wheel of plaintiff's mill.

The real question intended to have been tried in this suit was, whether defendant had the right to flow back water by means of his dam on plaintiff's land at all, and not merely to the prejudice of plaintiff's mill or mill rights, and that this was so understood by both parties is plain from the facts, (1.) that on a former trial of this cause several years ago the whole question was tried whether defendant had the right to flow any portion of the plaintiff's land. 2. That from the time of the commencement of the suit, in 1856, till the trial, when the order in question was made, it was never contended that the plaintiff claimed only the limited right now stated by the defendant, or that the defendant believed that he was defending for any thing else than the full right to overflow the land, as well to the prejudice of the land as of the mill. 3. That at the trial in

October last, when the order was made, the defendant, for the first time, raised the question whether the plaintiff was entitled, on the pleadings, to recover for backing the water on the plaintiff's land below the mill at all; and to avoid any doubt the plaintiff's counsel then applied for an order to amend the declaration in this respect, which was granted by the order; and then the defendant's counsel objected to going on with the trial, upon which the cause was ordered to lie over, the costs of the day to abide the event of the suit. 4. That the order was drawn up and served, and still no objection made until the term after. 5. That a submission to arbitration was agreed upon between the parties, when Wilson and Boulton were named as arbitrators, to ascertain whether the defendant's dam put back water on the plaintiff's premises or not, which arbitration fell through. And lastly, that in the year 1836 the plaintiff and his brother sued Turton Penn for flowing back the water, in the first count, to the prejudice of the plaintiff's mill, and in the second count to the prejudice of the plaintiff's land, to which Penn pleaded not guilty, and upon which the plaintiffs in that suit recovered substantial damages against Penn.

All these circumstances shewed the real question the plaintiff believed to be tried was exactly the same as the defendant believed it to be, namely, whether the defendant had the right to overflow the plaintiff's land, and not merely whether the plaintiff's mill was damaged by the overflow: *Commercial Bank v. Reynolds*, 24 U. C. R. 381.

C. S. Patterson, contra :—

The parties did not go to trial to determine the mere question of backwater or no backwater on the plaintiff's land, but whether such backwater was to the prejudice of the plaintiff's mill. It perhaps was never doubted that there was some flow upon the plaintiff's soil, but it has always been and still is a question for trial, whether, in any overflow which may be, that overflow is to the damage of the mill.

The defendant did not acquiesce in or assent to the order which was made: he opposed it as much as he could, and he is in time in moving against it, in the first term after it was made. The amendment made has had the effect of taking away from the defendant the prescriptive right which he had acquired to flow over the plaintiff's land to the extent of not damaging his mill, and this is a right which should not have been taken from him: *Doe Day v. Bennett*, 21 U. C. R. 405; *Hammond v. Heward*, 20 U. C. R. 36; *Bradrey v. Haselden*, 1 B. & C. 119; *Frankem v. Earl of Falmouth*, 6 C. & P. 526, 2 A. & E. 42.

If the plaintiff recovered against Penn in 1836, he failed to recover against Larry Lewis, the tenant of Penn, in 1842.

It is sworn the defendant's mill dam, which has been continued for a period of forty-two years, pens back less water than it did at any former period, and that within the last twelve years defendant has erected a valuable stone grist mill at a cost of about \$16,000, and that the height of water which he has is about eight feet altogether, of which two feet eleven inches are upon the plaintiff's land up to his water-wheel; and if the defendant be deprived of this additional head of water it will render his mill nearly useless, and that the plaintiff does not suffer any damage unless the water be penned back upon him to a height exceeding two feet eleven inches.

A. WILSON, J., delivered the judgment of the Court.

I am inclined to think, from production of the exemplifications in *Smith v. Church*, in 1833, and *Smith v. Penn*, in 1836, in which damages were claimed in respect of flowing back on the land as well as on the mill, though the record in the suit against Lewis is confined alone to the flowing back on the mills, and from the facts stated with respect to the first trial of the present cause, that damages were claimed as if the plaintiff claimed in respect of the overflow of his land, as well as of the damage thereby done to his mills, as a mill-owner; and from the further fact that at the last trial defendant started the objection as a matter which could

not be tried on the record, as it stood, he made no objection, when the plaintiff applied for leave to amend, that the amendment would be letting in a matter to be tried which was *not* the real question in controversy between the parties: and he only insisted he could not then proceed with the trial, and therefore the cause was directed to be laid over.

The defendant does not say now in any way whatever that backwater or no backwater was not the question really tried at the first trial on this record; nor does he deny the statement of the plaintiff, that "the objection taken by the defendant, and which caused the application for the amendment, was never raised by him until at Court at last trial," though the cause had since the first trial and before the last entry of it in October, 1867, been three times entered for trial and twice left to arbitration.

It also appears by the affidavit filed for defendant that the defendant's grist-mill was erected not more than twelve years ago, which is after the commencement of this suit; and by Haslett's affidavit it appears that this grist-mill "stands in the bed of the river, and on that side of the river where it stands no mill or building existed before the erection of the said grist-mill;" so that the defendant can claim no special right in respect of this particular mill against an amendment being made.

That which the parties on each side have always considered to be the matter in controversy, and which can only be said not to be the controversy in law, as Draper, C. J., said in *Tucker v. Paren* (7 U. C. C. P. 269), by reason of "the objection being of a purely technical nature," can scarcely be said to be a matter over which the Chief Justice at the trial had no jurisdiction, or, having the authority, that he did not wisely exercise it.

In reviewing the decision of a Judge we must be satisfied he was wrong before we can interfere; for, as has been said, "gravely to doubt is to affirm;" but I do not wish it to be understood that I entertain a doubt of the order having been properly made. I refer to the cases of *Webster v.*

Emery (10 Ex. 901); *Wilkin v. Reed* (15 C. B. 192); and *Tucker v. Paren* (7 U. C. C. P. 269).

The rule must, therefore, be discharged with costs.

Rule discharged, with costs.

STOCK V. SHEWAN.

New trial on payment of costs—Notice of trial before payment—Verdict set aside—Practice.

Where a new trial is granted to a plaintiff *on payment of costs*, the payment of the costs is a condition precedent to the right to give notice of trial. In this case, therefore, where plaintiff gave notice of trial before the costs were taxed and paid, though he had offered defendant's attorney to pay them at once and without taxation on his stating the amount, which the latter at first agreed, but immediately afterwards declined, to do, (apparently with the object of throwing plaintiff over the Assizes, then near at hand), notwithstanding the costs were within three days afterwards taxed and paid, the Court set aside the verdict, but under the circumstances without costs.

The duty of the attorney in such a case is to deliver a bill of his costs as requested, where he makes no objection of want of time, or inability to deliver it, and to receive payment without insisting on an official taxation.

H. CAMERON obtained a rule in the Practice Court, calling on the plaintiff to shew cause why the notice of trial served for the last Assizes for the County of York, the copy and service thereof, the entry of the record at the Assizes, and the verdict for the plaintiff, should not be set aside, with costs, for irregularity in this, that the notice of trial was served before the taxation or payment of costs payable by plaintiff under the rule granting a new trial, on payment of costs, and that the costs were not taxed or paid until after time for serving notice of trial for the said Assizes had expired, and on grounds disclosed in affidavits and papers filed.

The affidavits and papers filed on the motion were, an affidavit by Mr. Cameron, an affidavit by his managing clerk, a notice of the irregularity complained of, with an affidavit of service of the same on plaintiff's attorney.

From these papers it appeared a new trial had been granted to plaintiff, who had his own verdict set aside, because the jury had not allowed him interest on his promissory note sued on, the rule, which was granted on 23rd December last, providing that it was granted "on payment of costs."

The plaintiff's attorney served his notice of trial on the 31st of December for the Assizes to commence on the 9th of January, and at the same time he served a copy of the rule for a new trial, on which was endorsed a copy of an appointment to tax the costs under the rule for the 2nd of January, by leaving such notice and copy of rule with Mr. Cameron about 6 o'clock in the evening of that day. Mr. Cameron refused to accept the notice of trial, because of the irregularity in serving it before costs were taxed or paid, and he told Mr. Defoe the plaintiff's attorney so, and as the latter refused to take it back, Mr. Cameron gave it to his clerk, to have it returned, on the evening of the 1st of January. On the 2nd of January the defendant's attorney, not having time to make out the costs, obtained an enlargement until 3rd January, when the costs were taxed and during that day paid. On the 2nd or 3rd of January the notice of trial was laid on the counter in Osgoode Hall, in front of plaintiff's attorney, by the clerk of defendant's attorney, who told plaintiff's attorney he had been instructed to return it as irregular.

On 7th January a notice was served on plaintiff's attorney that the notice of trial which had been returned was irregular and void, because served before taxation or payment of costs under the rule for a new trial, and that defendant's attorney protested against plaintiff's attorney going to trial thereon, and that he would move to set aside the verdict, entry of record and all proceedings had upon said notice, with costs, if he proceeded to trial. Plaintiff, however, did go to trial and took a verdict against defendant, no one appearing for defendant.

On the return of the rule the following further facts were stated on affidavit by plaintiff's attorney: That the Court

made the rule absolute for a new trial, on payment of costs, on Saturday the 21st of December; that the plaintiff's attorney was absent from Toronto, and after his return he went to Mr. Cameron, on the 31st of December, and asked him to furnish the amount of his costs, as the plaintiff's attorney wished to pay them; that Mr. Cameron said his clerk, who was present at the time, would make them out and state the amount; but that Mr. Cameron soon after said he would not state his costs, that an appointment must be taken out; that he (plaintiff's attorney) said if he (Mr. Cameron) would state the amount he would pay it at once; but Mr. Cameron refused, saying an appointment must be taken out; that he (plaintiff's attorney) therefore took out an appointment for the 2nd of January, and served the same, with notice of trial and copy of rule, on 31st of December.

Defoe shewed cause.

Smart, contra, cited *Bergin v. Whitehead*, Draper's Rs. 520; *Brown v. Goodeve*, 2 Chamber Rs. 158; *Nichols v. Bozon*, 13 East 185; *Doe dem McMillan v. Brock*, 1 U. C. R. 482; *Clarke v. Clement*, 3 L. J. N. S. U. C. 181; *Steel v. Manning*, 8 U. C. L. J. 167.

A. WILSON, J., delivered the judgment of the Court.

In *Nichols v. Bozon* a nonsuit was set aside on payment of costs. The costs were taxed, demanded of the plaintiff, but never paid. Notwithstanding this the plaintiff gave notice of trial and entered the cause for trial, though warned by the defendant's attorney that he should consider the notice of trial a nullity for want of payment of the costs taxed. The plaintiff proceeded to trial and took a verdict. The defendant afterwards obtained a rule calling on the plaintiff to shew cause why the verdict obtained should not be set aside, &c., &c. Lord Ellenborough, C. J., said, "The nonsuit was only ordered to be set aside 'upon payment of costs.' The payment therefore of these costs, when taxed, was a condition precedent to the plaintiff's proceeding to another trial." The rule was, therefore, made absolute.

In *doe dem. McMillan v. Brock* the plaintiff discharged the defendant's rule for judgment as in the case of a nonsuit, upon entering into the peremptory undertaking, upon the condition of paying the costs of the day and of the application. Without paying or tendering these costs the plaintiff gave notice of trial. He tendered the costs to the defendant's attorney late in the Assize, just before the cause was called on and proceeded. The Chief Justice said, "The plaintiff had no right to give notice of trial under such circumstances till he had paid the costs. It was altogether a nullity. It was a proceeding by a party where he had no right to proceed. The payment of costs should have preceded the giving of this notice, to be of any avail to the party.

In *Clarke v. Clement* a nonsuit was set aside on payment of costs by the plaintiff. The plaintiff, however, gave notice of trial without payment of costs. The notice of trial copy and service were set aside by the Chief Justice of this Court.

The only case which I have to add to these is *Farrer v. De Flinn* (8 Jur. 779). There a new trial was granted to the defendant, on payment of costs. The rule was made absolute on the 9th of February and served on the 14th. On the 16th the parties attended before the Master to tax, when the taxation was adjourned for some days. On the 12th of March the taxation was completed. The commission day was the 23rd of March, and on the last day of giving notice, the 13th of March, the plaintiff gave notice of trial. The costs were not demanded in London, but a demand of payment was made by the plaintiff's attorney, at Manchester, on the 18th of March. The defendant's Attorney refused to pay them and the plaintiff's attorney thereupon countermanded his notice of trial. The defendant on the 1st and 4th of April tendered the costs, which the plaintiff's attorney refused to accept. Wightman, J. said, "A notice of trial was not a waiver of the costs of the previous trial, though proceeding to trial no doubt is."

The cases of *Nichols v. Bozon* and *Doe dem McMillan v. Brock* shew that the notice of trial given without pay-

ment of costs was not a proper proceeding, because the payment was a condition precedent *to the plaintiff's proceeding to another trial*, which I understand to mean precedent to the service of a notice of trial. In the last of these cases the notice of trial was held to be a nullity.

In *Clarke v. Clement* the notice of trial was held to be an improper step to take when the plaintiff had not paid the costs entitling him to proceed to trial.

In these three cases the plaintiff was relieved from a nonsuit, upon paying costs. He had no right, therefor, to treat this nonsuit or adverse proceeding, by giving a notice of trial, as if it were set aside, without first complying with the conditions which alone authorized him to set it aside.

The nonsuit could not be standing against the plaintiff, and yet the plaintiff have the right to proceed as if it were not standing against him.

In *Farrer v. De Flinn*, however, it was not the plaintiff who had a nonsuit or the adverse proceeding standing against him: it was the defendant, who was granted the favour of having the plaintiff's verdict set aside, upon his paying the costs of the day to the plaintiff.

When the plaintiff, therefore, gave notice of trial he was not interfering with any adverse proceeding against himself: he was affording an advantage to the defendant; for while he could not be compelled to give notice of trial without his costs, he was willing to give the defendant so much longer time to fulfil his condition, if he wished to do so. His notice of trial was given upon an implied understanding, that if the costs were paid before the time for countermand, he would accept them as in time and proceed; but if they were not paid by that time, he should countermand and treat the defendant as in default. Nothing could be fairer to a defendant, and nothing could be harsher to a plaintiff, than to hold his indulgence to be any waiver of his rights. Accordingly, Mr. Justice Wightman decided the plaintiff might properly serve his notice of trial conditionally on the defendant's performing his part by payment, and countermand it if he did not.

The present case is not exactly like the one just mentioned; for here it was not the defendant who set the plaintiff's verdict aside, but the plaintiff who set aside his own verdict: it was, therefore, in the nature of a proceeding adverse to him. Nor was the service of the notice of trial any advantage to the defendant, by giving him a longer day of payment; but it was a right which was taken by the plaintiff for his own benefit, to the prejudice of the defendant and at his expense.

The delay of the plaintiff's attorney from the 23rd to the 31st of December, and acting only on the last day, and the last for giving notice of trial, is chargeable wholly against himself, and has no doubt been the direct cause of the present difficulty. Then, the promise by the defendant's attorney to give the amount of costs on the 31st of December, and his abrupt refusal afterwards to give it, though he was told he would be paid at once, was an act, perhaps intended, but certainly calculated, to make it too late for the plaintiff to proceed to trial at the Assizes for which notice was given, and was not a proceeding which the attorney was justified in resorting to. His duty was, as he made no objection to the want of time, or of any inability, to give a bill of the costs, when requested. The plaintiff's attorney said he would pay it at once, and he was entitled to pay it without taxation if he pleased, as it would have been quite legal if the defendant's attorney had made out his bill without the sanction of an appointment or a formal taxation.

It is perplexing to the Court when the parties stand on their extreme rights, especially when it happens that both parties are in some respect to blame, and when the rights to be affected are of very considerable moment.

The plaintiff's attorney is to blame for the delay in acting on his rule for so many days, when every day was of value to him. He was to blame also to some extent in giving the notice of trial for his own advantage before he had complied with the condition on which he was to be at liberty to vacate his verdict.

The defendant's attorney was to blame for not giving the bill of costs when he promised to give it, and when he was told it would be paid. He was not right in insisting on an official taxation until he saw he could not complete it with the plaintiff's attorney; for it is difficult to avoid the conclusion that his refusal was to effect a purpose which was not quite right, however serviceable it may have been to his client.

And on this point of practice depends the question whether a verdict for at least \$1,200 shall be permitted to stand, or be set aside.

I must, therefore, effect a compromise in some way which may be serviceable to both parties. The defendant undoubtedly owes the promissory note sued on, amounting to \$1200. Whether he owes the interest or not may be a question. We thought he did when we made the rule absolute for the plaintiff; but since then the Chief Justice has referred to a case in which Mr. Justice Byles, the highest authority on such a subject, decided that it was entirely a question for the jury.

If we had seen that case before the rule was granted we should not have granted it. The defendant may, therefore, desire to contest his liability for interest.

I should have been inclined, following the course taken in the case in 8 Jur. 779, to have made the rule absolute on condition of the defendant bringing into Court a considerable portion of the demand; but as the other members of the Court do not think the circumstances shew the defendant was in fault to the extent that I do, they are of opinion no such condition should be attached.

The rule then will be made absolute without costs to either party.

Rule absolute, without costs.

*This judgment reversed in Ct of Err & Appl
21 C.P. 523 = \$.*

192 COMMON PLEAS, HILARY TERM, 31 VIC., 1868.

TODD V. THE LIVERPOOL AND LONDON GLOBE INSURANCE
COMPANY.

*Insurance—Insurable interest—Warehouse receipt—Increase of risk—Perverse
verdict.*

In an action on a policy of insurance by A., brought for the benefit of B., an incorporated Bank, to whom the policy had been assigned, on a traverse of any insurable interest in B., *Held*, that a warehouse receipt for wheat, the property of A., a warehouseman, signed by a clerk of A., in his own name, was sufficient, under Stat. 24 Vic. ch. 23 sec. 1, to pass the property in the wheat, so as to confer an insurable interest in B.

The policy was subject to a condition that in the event of any alteration, &c., *whereby the risk should be increased and a consequent additional premium required*, the policy should be void, unless notice of such alteration, &c., should be given to defendants and allowed by indorsement on the policy, and consequent additional premium paid.

It appeared in evidence that at the time the policy was effected by A, he was told by the agent of the defendants that if an elevator was erected on the premises without informing the defendants, his policy would be avoided, as, in that case, he would have to pay an additional premium, but this was not inserted in the policy. A. erected an elevator on the premises, and did not give notice to the defendants:

Held, on a plea setting out the condition and alleging the erection of the elevator, and that the risk was thereby increased, *and that a consequent additional premium would have thereby been required*, that the jury not having found any increase of risk, the facts afforded no defence.

Semble, that a verdict is not perverse, where a jury find against the direction of a Judge on a point of law, unless the ruling of the Judge is correct.

THE declaration stated a policy of insurance against loss by fire, made by defendants to plaintiff, under the hands and seals of two of the Directors of the Company, dated the 17th December, 1866, to the extent of \$2,000, on wheat and other grain, pork and farm produce, contained in a building owned by one Carter and occupied as a storehouse, situate on lot No. 66, Jarvis survey of Seaforth, isolated, built wholly of wood; further described in application of assured, filed in the office of the Company, as No. 2354, which was declared to be his warranty and made part of the said policy. It was then stated that plaintiff, holding a warehouse receipt for all the wheat so insured, duly endorsed and transferred the same, and the wheat therein mentioned, to the Royal Canadian Bank, to secure the Bank for a certain loan and advance of money, by the discounting of a promissory note then made by the Bank to the plaintiff,

on the security of the warehouse receipt and policy; and that the policy was also then, with the consent of defendants, duly transferred by plaintiff to the Bank, and defendants assented to and accepted the said assignment of the policy: *Averment*, of interest of Bank in warehouse receipt and policy till loss by fire, and that the premises insured were destroyed by fire, whereby loss was sustained on the wheat in the receipt and policy mentioned, to the amount insured thereon: *Breach*, non-payment by defendants.

Second count.—Second policy, dated 10th January, 1867, for \$2000, on wheat, &c., in same storehouse: statement as to warehouse receipt, and transfer of same to Royal Canadian Bank, and assignment of policy, with other averments similar to those in first count.

Pleas.

1. Denial of policies.

2. Denial of loss by fire.

3. To first count, that plaintiff did not truly and circumstantially describe the buildings, &c., according to a condition of the policy.

4. To first count.—The policy was subject to a condition “that in case any alteration or addition be made in or to any risk on which an insurance has been effected, whether such alteration or addition do consist in the erection on the premises of apparatus for producing heat, or in the introduction of articles more hazardous than may be allowed in the policy, or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk is increased and a consequent additional premium would be required, and whether such has been effected on the building itself or on goods wares or merchandise deposited therein, and the assured shall not have given notice thereof, respectively, to the said Company, or its agent, in writing, and unless such alteration or addition shall be allowed by endorsement on this policy and such increased premium paid as may be required, such policy of insurance shall be null and void.”

Averment, that after the making of the policy in the first

count mentioned an alteration and addition, to wit, an addition to said building, containing an elevator, was made to the building in which the goods insured by the policy were deposited, whereby the degree of risk on said goods was increased and a consequent additional premium would have been required, and the assured did not give notice thereof to the Company or its agent, nor was such alteration or addition allowed by endorsement on the policy.

Fifth plea, to first count.—That after the fire defendants reasonably required from the Bank, according to the policy, a statement of the account of plaintiff with the Bank, which was necessary to enable defendants to ascertain the amount of the loss, but the Bank refused to furnish the same.

Sixth plea, to second count, same as third plea to first count.

Seventh plea, to second count, same as fourth plea to first count.

Eighth plea, to second count, same as fifth plea to first count.

Ninth plea, to first count, that neither plaintiff nor the Bank was interested in the insured premises or property, or in the policy, as alleged.

Tenth plea, to second count, same as ninth plea to first count.

Issue.

The trial took place before Hagarty, J., at the last County of York Assizes, when a verdict was found for the plaintiff, for \$3173.48 damages.

The evidence was to the following effect:

“Warehouse receipt, Seaforth, C. W., 27th December, 1866.

Received in store from Robert Todd, owner, one thousand bushels No. 1 Spring Wheat, to be delivered pursuant to his order, to be endorsed hereon. This receipt to be regarded as a receipt under the provisions of Statute 22 Vic. ch. 20, being 22 Vic. ch. 54 of the Consol. Stat. of C. and the amended Stat. 14 Vic. ch. 23.

ROBERT COLEMAN.”

Endorsed,

“To be shipped pursuant to the order of the Royal Canadian Bank.

ROBERT TODD.”

Accompanying this receipt was a note dated 27th of December, 1866, for \$1,000, made by Robert Todd at three months, payable to the order of the Royal Canadian Bank, at their office in Seaforth.

There was also a warehouse receipt of the 10th of January, 1867, in the like form, and made by and to the same parties as the one above set out, for 1000 bushels spring and 500 bushels fall wheat; endorsed in all respects like the preceding one, and to which was annexed a promissory note made by Robert Todd, dated 10th January, 1867, for \$2,000, payable at sixty days to the order of the Royal Canadian Bank at their office in Seaforth.

At the close of the plaintiff's case counsel for defendants moved for a nonsuit, because the two warehouse receipts were invalid, being signed by Todd's clerk, instead of by himself: that the property mentioned in the receipts, if they were void, was still Todd's property, and he transferred 3500 bushels to Carter, which was all he had; and the Bank, therefore, had no interest in the policy and could not recover.

Leave was reserved to move for a nonsuit on these grounds.

Galt, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit, pursuant to leave reserved; or for a new trial on the law and evidence, and because the verdict was contrary to the Judge's charge, and perverse in this, that the learned Judge directed the Jury, as matter-of-law, to find a verdict for the defendant, and the jury returned a verdict for the plaintiff.

Harrison, Q. C., shewed cause:—

There was evidence given that there was wheat in the storehouse to meet these receipts, and that such wheat was there at the time of the fire. On this point the verdict should not be disturbed.

The putting in of the elevator did not alone avoid the policy : the question, and the only question was, whether it increased the risk or not, and the jury found it did not. The conversation of the agent at the time of the agreement to insure, as to the elevator, cannot alter the contract : *Date v. The Gore District Mutual Insurance Company*, 15 C. P. 175.

It was for the jury also to say how far they relied on the agent's testimony : *Brown v. Malpus*, 7 C. P. 185 ; *Reed v. Mercer*, 16 C. P. 279 ; *Lane v. Jarvis*, 5 U. C. R. 127 ; *Lacey v. Forrester*, 3 Dowl. 668.

The warehouse receipts are good under the Consol. Stat. of C. ch. 54, sec. 8.

Addison on Contracts, 462, shews who is a warehouseman. The Statute does not require the person giving the receipt to be engaged in the calling of a warehouseman : *Smith's Mer. Law* 119 ; *Park v. Phoenix Insurance Company*, 19 U. C. R. 110 ; *Stevenson v. The London, &c., Insurance Company*, 26 U. C. R. 148.

These receipts are good, at any rate, under the 24th Vic. ch. 23 sec. 1 ; and they are good as against Todd, and therefore as against the Bank, standing in Todd's place.

Galt, Q. C. contra :—

Consol. Stat. C. ch. 92, sec. 68, makes a distinction between the warehouseman and his clerks. Banks are in general prohibited from dealing in such securities as warehouse receipts. Their power to do so is under the special provision of the Statutes. Consol. Stat. C. ch. 54, sec. 10, imposes a penalty for giving a false receipt ; but there is no penalty for endorsing it ; and if the clerk can give the receipt and the master endorse it, the guilty party, and the one who profits by the act, escapes punishment, while the subordinate alone suffers.

As to the merits, it is clear that if there were only a little over 8,000 bushels of all grain in the storehouse at the time of the fire, the plaintiff cannot recover ; for upwards of 5000 bushels belonged to Currie, and the plaintiff had transferred 3,500 bushels to Carter.

Putting in the elevator avoided the policy ; for the agent

had declared that it did in the opinion of the Company, and according to their rules and tariff, increase the risk and require an extra premium to be paid.

A. WILSON, J., delivered the judgment of the Court.

From the evidence of Coleman and McDougall for the plaintiff, and of Currie for the defendants, it may not be too much to assume that there were 9000 bushels of all kinds of grain in the storehouse when it was burned. Currie was entitled to receive from Todd 5,530 bushels, which would leave 3,470 bushels to be applied to other persons.

The plaintiff had received four receipts from his clerk, Mr. Coleman, as follows :

27th December, 1866, for 1,000 bushels spring wheat.

4th January, 1867, { for 600 " "
 { and 300 " fall wheat.

10th January, 1867, { for 1,000 " spring wheat,
 { and 500 " fall wheat.

8th February, 1867, { for 1,000 " "
 { and 500 " spring wheat ;

all of which he assigned to the Royal Canadian Bank, and he gave a receipt himself to George Carter, 30th January, 1867, for 3,500 bushels spring wheat, making in all 8,400 bushels, which he had assumed to transfer, which left a deficiency between what he had and should have had of 4,930 bushels.

It is plain, therefore, there was what appears to have been a deliberate fraud in issuing receipts for grain in store, when there was not grain there to answer the receipts.

It is also plain there were receipts issued by Coleman, as above stated, amounting to 4,900 bushels, being an excess of 1,430 bushels over what was in store at the time of the fire, after deducting Currie's wheat. It would be of great consequence if we could ascertain truly whether these quantities were ever actually in store or not ; but for the purposes of this cause it may be possible to do without that knowledge, for there is an issue which requires the plaintiff to shew he had the quantity of wheat claimed in the suit in store at the time of the fire.

Assuming the receipt given by Todd himself to have been given without his having had the wheat which it represented, then there were claims by Currie, and by the Bank on four receipts, amounting to 10,430 bushels, or an excess of 1,430 bushels more than was destroyed by fire. This difference, unless it can be certainly shewn whose quantity it was that was wanting, should be apportioned between the parties according to their respective proportions, which would be as fifty-five to forty-nine, or about 756 bushels to be deducted from Mr. Currie's share, and 674 bushels from the share of the Bank.

If the whole deficiency could be shewn to belong to one share, the other share would of course be left entire, and this it is said by the Bank they have shewn.

The Bank should, however, shew that they had as much as 4,900 bushels in store at the time of the fire; that is, as much as the total of the four receipts; for they cannot say in the absence of express evidence in support of it, that the deficiency was in respect of the two receipts not sued on, more than on the two receipts which are sued on.

Coleman says the wheat mentioned in the receipt of the 27th of December was in a bin on the ground floor, and was elevated to a bin on the first floor; and he says the same as to the wheat in the receipt of the 10th of January; and he says at the time of the fire the Bank had about 4,800 to 4,900 bushels of wheat, and Currie had about 4,000 bushels, and he thought he kept the Bank wheat separate. McDougall's evidence on this point adds nothing, for he knows no more than Russell, the Bank agent, or that some one told him it was the Bank wheat; and he makes by his estimate 550 bushels more than the Bank claimed in all four receipts.

Coleman's testimony is not at all satisfactory as to the identity of the wheat. He says, "Todd shipped a good deal of wheat in January. There was the same wheat which was receipted on the 27th of December in the warehouse at the time of the fire. Some shipped by Todd may have been included in the receipts: cannot be sure of this. I

tried to keep enough to cover the receipts I had given." Then he says that he himself took some out of these bins, putting back enough to make up quantities.

Here he says, first of all, the wheat specified in the receipt of December was the same that was destroyed by fire; then, that Todd may have shipped some of the wheat receipted; then, that he himself took some out of the bins and made it up again.

His evidence as to quantities is still more unsatisfactory. He says, "On the 30th of December there was as much as 1,000 bushels of spring wheat in store." This, one infers, is to cover the quantity in the receipt of the 27th of December. Then he says, "From the 1st to the 10th of January, I think, there were 1,500 bushels bought, beside the 1,000, to the best of my knowledge." This is to cover the quantity contained in the receipt of that date. He also said, "I think there was on 10th January, beside these quantities, no large quantity: on that day about 2,000 to 2,500 bushels of spring wheat, and beside Carter's wheat about 600 bushels of fall wheat."

There is no evidence of there being on that day more than 2,000 bushels of spring wheat in store which is just the quantity of spring wheat contained in the two receipts in question; and his speaking vaguely of 2,000 to 2,500 bushels does not induce one to believe there was more than he has been able precisely to shew. Then he says there were also about 600 bushels of fall wheat there.

Now the receipt of the 10th of January, being for 1,000 bushels of spring and 500 bushels of fall wheat, inclines one to believe he was making out a sufficiency in store on the 10th of January to answer the amount of the two receipts, and that was all we have an account of, besides Carter's, which was there at that time.

The witness had apparently forgotten his own receipt given on the 4th of January for 900 bushels of wheat, for he had given no account of quantities to cover it in his evidence.

Then again he says, "For about a week after the plaintiff

left I received wheat in store." How much he does not say, though there is no reason why he should not be able to give these quantities, or the shipments made after the plaintiff left, if there were any.

He also says that Gilpin and Currie stored there about 5,000 bushels. Now Mr. Currie shews they had stored 9,044 bushels in all.

In many respects the witness's testimony is most unsatisfactory as to quantities.

These were questions for the jury, and if they believed him they might come to the conclusion that the Bank wheat, contained in Coleman's four receipts, was specifically set apart for them, and was all in the warehouse at the time of the fire. It does not appear when the 1,500 bushels mentioned in Coleman's receipt of the 8th of February came into the storehouse. If it came in before the 31st of January, then it passed by the plaintiff's own receipt, given on the 30th, the day before, as parcel of the 3,500 bushels, to Carter. If it came in after that day it would not pass by it, unless it was specifically applied to it when it came in, of which there is no evidence, and then it would be applicable to the receipt of the 8th of February. But this also was a subject for the consideration of the jury.

I do not see clearly how to interfere either as to the identity of the wheat or the quantity of it, as claimed by the Bank, although I think the recovery in these respects rests on the most unsatisfactory evidence.

The only issues as to the alterations made on or in the building are the fourth and seventh, and they both state that the risk was thereby increased, which is the language of the condition, and as alterations generally are not prohibited, but only such as did increase the risk, and no increase of risk was found, the defendants must fail on that part of their rule. These verbal conversations had between parties respecting matters which the written contract provides for cannot be relied on or permitted.

It may be possible that if an insurance were effected upon the express understanding that a particular trade should

not be carried on in the premises, and the insured intended nevertheless to carry it on the moment the policy was granted, and fraudulently made his representation, and concealed his purpose so to do, and he did, on getting his policy, commence such trade, that the insurer might plead the fraud in avoidance of the contract; for fraud is an extrinsic collateral fact. The defences pleaded here are not of fraud. Then, it is said, the four receipts given by Coleman were invalid and void, because given by a clerk of the warehouseman, and by a person not a warehouseman.

The Consol. Stat. of C. ch. 92, sec. 68, contemplates the receipt being given by the warehouseman or his clerk, for it subjects the one as well as the other to the penalty of the Statute.

The Consol. Stat. of C., ch. 54, sec. 8, enables Banks to receive by endorsement or transfer receipts given by warehousemen for cereal grains, &c. This says nothing of receipts given by their clerks or agents; but there can be no reason why in this case as in any other a clerk or agent may not act for his master or principal.

The 10th sec. of this Act subjects any person, knowingly giving, accepting, transmitting and using the same, to the penalties of ch. 92, sec. 68.

The 8th sec. of chap. 54 did not necessarily exclude the keeper of the warehouse drawing a receipt in his own favour for grain, &c., deposited there by himself, as owner of the goods; but to avoid any difficulty on this point the 24 Vic. ch. 23 was passed, enabling the warehouseman, so having grain in his own storehouse, as owner thereof, to make and use such receipt as if it were given to a third person. I do not see any legal objection to the receipts given by Coleman in favour of Todd, by the clerk to the master. They must be quite as good as by the master to himself, which is so expressly allowed by Statute.

I do not discover any legal difficulty in the way of the Bank's recovery. I perceive many objections on the facts of the case; but they have all been investigated, and I do not know what service another trial would be, or how it could

properly be granted when the cause has been fully and fairly tried.

A new trial is asked, also, because it is said the verdict is perverse, the Judge having instructed the jury, as matter of law, to find for the defendants, and they found for the plaintiff.

I do not see in the notes of the learned Judge that he so directed the jury; but I am not satisfied that a verdict must be perverse in such a case, unless the Judge lay down the law correctly. If a verdict be correct as it stands, and if the Court is of opinion the direction of law given by the Judge at the trial was erroneous, of what possible use could it be in any case to set the verdict aside and send down the cause again to a jury, when there might be nothing to try under the law, as settled by the Court?

I think the rule must be discharged.

Rule discharged.

CURRIER ET AL. V. OTTAWA GAS COMPANY.

Incorporated Co.—C. S. C. ch. 65—Informality in appointment of directors—Pro. note signed by President—Bonâ fide holder—Liability of Co.—New trial refused.

A Company, incorporated by Con. Stat. of Canada, cap. 65, were empowered, amongst other things, to borrow money for purposes specified in the Act, and through their President were authorized to make promissory notes, &c. The President, acting upon a resolution of the Directors to that effect, signed the promissory note in question. In an action upon the note, it appeared that the Board of Directors had not been appointed in the manner required by the provisions of the Act of incorporation: *Held*, that the resolution sufficiently complied with the Act, and that inasmuch as the Statute vested in the Directors the power of authorizing the President to sign notes to bind the Company, a person accepting such notes in good faith, the proceeds of which were applied for the benefit and purposes of the Company, might presume that the proper authority had been given by the Directors to the President to sign the same; and it appearing that the plaintiffs in this case had accepted the note sued upon in good faith, and that the proceeds thereof had been applied by the defendants for the purposes of the Company, and to enable them to maintain their credit and pay their debts, the verdict in the plaintiffs favour was upheld.

DECLARATION on a promissory note made by defendants

on 6th August, 1866, payable to Thomas Patterson or order three months after date, for \$902.35, and by Patterson endorsed to Samuel Howell, who endorsed to plaintiffs, with the usual averment of presentment and dishonor.

Pleas 1.—Non fecit.

2. Payment.

3. Delivery to plaintiffs of certain of their bonds, which they used in satisfaction of the note.

Issue.

The case was tried at the last Assizes held at the City of Ottawa, before Hagarty, J.

The person who acted as Secretary of the Company from April, 1865, to September, 1866, was called as a witness, and proved that the note sued on was signed by G. B. Fellowes, as President, and by himself, as Secretary, of defendants' Company. He also proved the signature of the endorser.

The consideration for the note was a loan of cash made by plaintiffs to the Company. This particular note was to protect a former note of the Company, of which it was a renewal. The note was in renewal of one first given 23rd December, 1865, and duly entered in the bill books, which were produced.

There was an election of Directors of the Company on the second Monday of April, 1866, (the minutes of the proceedings of the Company were produced,) and Messrs. Fellowes and several others were chosen. These Directors met next day, 10th of April. All the Directors but one were then present, when Mr. Fellowes was elected President and Howell Vice-President. *It was resolved that the President, and in his absence the Vice-President, be authorized to sign notes.* On cross-examination he said the by-laws of the Company were in the minute book, which was produced. He could find no *by-law* for an election after 1860. Since that time there had been nine Directors. There were but five by the Act of Incorporation. The Company had carried on business since June, 1854. There

was a *resolution* in April, 1855 to elect nine Directors. Since that period there had been nine Directors elected, probably every year though it was not so stated positively.

In 1865, the Prov. Stat. 29 Vic. cap. 88, changed the name from Bytown to Ottawa, and made good all previously done.

No by-law could be found before or since the late Act. There was no special meeting or vote authorising the President to sign this particular note.

For the defendants it was objected that under Con. Stat. of Canada, cap 65, secs. 73 and 74 authority must be given from time to time to the Directors by resolution to sign the particular note, while here the authority was only general.

2. That the Board was improperly constituted; that there was no *by-law* fixing the time and place of holding the election as required by the Statute, and there was no *by-law* increasing the number of Directors from five to nine.

It was then agreed that a verdict should be entered for plaintiff, with leave to defendants to move to enter a nonsuit on the points raised.

In Michaelmas term last, *S. Richards*, Q. C., obtained a rule *nisi* to enter a nonsuit, on the ground that there was no authority shewn to sign this note on behalf of the Company; that the resolution, under which it was signed, was general, and the Statute required special authority to be given from time to time to sign such notes as in the opinion of the Directors might be necessary; that the parties who passed the resolution and gave the authority were not Directors of the Company, and thus defendants were not responsible for their acts, the only legal Directors being the original five Trustees, and no by-law having been passed fixing the time and place of election of Directors or Trustees, and no by-laws having been passed increasing the number of Trustees or Directors to nine; that the note was not signed by the President of the Company, the person signing not being the legal President elected by a Board

of legally constituted Directors; and that the instrument was not shewn to be a note of the Company.

The rule was enlarged until this Term, when

McBride shewed cause:—The 17th section of the Consol. Stat. of Canada, Cap. 65 provides that if the election of Directors be not made on the day when, according to the by-laws of the Company, it ought to be made, the Company is not to be dissolved, but the stockholders may hold the election on any other day in the manner provided for by such by-laws, and all the acts of the Directors until their successors be elected shall bind the Company. The corporation therefore is not dissolved, and the acts of Directors are binding on the Company. Sections 67 to 75 shew the Company has power to borrow moneys. By sec. 73 the Directors, by a resolution entered upon the books of the Company, may from time to time, as they see fit, authorize the President to sign such bonds and instruments as it may, in the opinion of the Directors, be necessary or expedient so to sign, and to affix the common seal of the Company thereto. By sec. 74 the President, or the Manager of the Company, to be from time to time authorized as aforesaid, may draw, sign or accept such promissory notes or bills of exchange, for the purposes of the Company, without seal, as in the opinion of the Directors it may be necessary or expedient so to sign or accept. Sec. 75 declares all such bonds, sureties, notes, &c., valid.

The Company, being a trading Company from its very organization must be empowered to make notes and accept bills of exchange, and the plaintiff, who in good faith parted with his money to them, is entitled to recover. The Stat. 29 Vic. cap. 88 confirms most of the proceedings of the Company up to the 18th September, 1865.

He referred to *In re Norwich Yarn Company*, 2 Beav. 143; *Lindus v. Melrose*, 2 H. & N. 293, 3 H. & N. 177; *Smith v. Johnson*, 27 L. J. Ex. 363; *Mayor of Ludlow v. Charlton*, 6 M. & W. at p. 822; *Bank of Australasia v. Bank of Australia*, 12 Jur. 89; *Diggle v. Railway Company*, 5 Railway Cases 571; *Forbes v. Marshall*, 11 Ex. 166; *McLae v. Sutherland*, 3 E. & B. 1.

McMichael, contra :—

Under secs. 73 and 74 of the Consol. Stat. defendants' Company will not be bound, unless special authority was given to sign each note, and then the note so signed would bind the Company.

No corporation, unless a trading one, can make notes without special authority. The general doctrine is not exploded that the corporation can only act under its seal, and *primâ facie* the seal of the corporation, being attached to a bond, binds, and if they wish to shew it does not, the burthen of doing so is cast on them, and that is the ground of the decision in the *Royal British Bank* against *Turquand*. There the seal of the corporation was affixed to the bond, and it was *primâ facie* legal. It was necessary to shew that it was *ultra vires*. They could not do so, for their deed of settlement shewed that the Directors might borrow money on bonds under the seal of the Company by a resolution to be passed. The Court held that the holders of the bond were not bound to see if the special resolution was passed authorizing the money to be borrowed : that was a matter between the Directors and the Company. But here the defendants, being a corporation, *primâ facie* were not bound by the signature of the President to a promissory note, and it was for the plaintiff to shew that in all things the special authority conferred by the Act had been obtained by the President before a promissory note signed by him on behalf of the Company could bind them. He cited *Royal British Bank v. Turquand*, 3 E. & B. 248, S. C, 6 E. & B. 327; *East Anglian Railway Company v. Eastern Counties Railway Company*, 11 C. B. 775.

RICHARDS. C. J., delivered the judgment of the Court.

The defendants were incorporated 22nd April, 1854, under the provisions of the Stat. 16 Vic. cap. 179, consolidated as Con. Stat. of Canada, cap. 65. Under the first section of the Statute the declaration in writing, on which the Company was to be formed, was to state, amongst other things, the number and names of the trustees who were to manage the

concerns of the Company for the first year. Sec. 5 enacted that the stock and concerns of the Company should be managed by not less than three, nor more than nine Directors, who, except the first year, were to be annually elected by the stockholders, at such time and place as should be directed by the by-laws of the Company. Sec. 7 provided that in case of non-election of Directors on the day when, according to the by-laws of the Company, it ought to be made, the Company was not to be dissolved; the stockholders might hold an election on any other day in such manner as might be provided for by the by-laws, and all acts of the Directors of any such Company, until their successors should be elected, were to be valid and binding as against the Company.

By sec. 12, the Directors had power to make by-laws for the management of the affairs of the Company, and any copy of a by-law under the hand of the clerk, having the corporate seal affixed to it, should be *prima facie* evidence of the by-law in all Courts in the Province. That Act was amended by 18 Vic. cap. 94, 30th May, 1855, and under the seventh section the word Directors was substituted for Trustees throughout the whole Act, and in all proceedings that might have been taken under it the word Trustees, whenever occurring, was to be construed to mean Directors.

By sec. 4, the President or any three Directors could call a special general meeting of the stockholders for any purpose. By sec. 5 a majority of the stockholders present at any special general meeting were to have power to make and enact such by-laws as were in the former Act authorized to be made by such Company, and also to make by-laws for increasing or diminishing the number of Directors for managing the affairs of the Company, not exceeding nine, including the Mayor of the city or town holding stock in the Company, nor less than three, including the Mayor.

In April, 1855, after the Company had been a year incorporated, there was a resolution by the Board of Directors, as I understand it, to elect nine Directors, and since that period *nine* Directors have been elected annually, as I infer from the evidence, ever since.

At the time this resolution was passed by the Directors they had the power to make by-laws to increase the number of Directors, and the objection now taken as to the number of Directors, as I understand it, is that the number was increased by a resolution of the Directors instead of a by-law. The power to make by-laws on these subjects was not conferred on the stockholders of making by-laws at a special general meeting until the Act of 18 Vic., which was passed on 30th May, 1855. After the passing of the resolution referred to, the Company continued the business from that time forward, as I understand it, electing nine directors annually until the passing of the Statute 29 Vic. cap. 88 on 18th September, 1865.

Sec. 1 of that Act declared that "the Bytown Consumers, Gas Company (incorporated, as already mentioned, under the Act of 16 Vic. cap. 169) have been since the filing of the declaration under that Statute in the Registry Office of Carleton an incorporated Company, under the name in the statement or declaration mentioned, and all contracts, agreements, &c., made, executed, renewed, &c., or granted by the said Company under the corporate name, have been legally made, received, &c., and are legal and binding."

Sec. 2. After the passing of that Act the Company should be called and known as "The Ottawa Gas Company."

Power is given to extend the operations of the Company to New Edinburgh and Hull, enabling the Company to recover for damages done to their property, to increase the capital stock of the Company, and create preferential stock, and raise money by mortgage; and the seventh section declares that the provisions of Cap. 65 of Consolidated Statutes of Canada should continue to apply to the Company, except as altered by that Act.

From April, 1855, to September, 1865, the affairs of defendants' Company were managed by nine Directors, and the annual election of these Directors occurred without any by-law either fixing the time of elections or increasing the number of the Directors. Now, during the whole of that period, it is contended, the proceedings of the Company

were wholly irregular and void, or we must assume that the whole body of the stockholders approved and in effect confirmed the proceedings that were being had from year to year in electing the increased number of Directors, and electing them annually, when no by-law had been passed by the stockholders at a special general meeting.

I think we may safely assume that the acts of the persons who were elected from time to time as Directors, and acted as such, would, under the seventeenth section of the Consolidated Statutes, be valid and binding against the Company.

If these elections and these acts of the parties elected were not approved of by the whole body of the stockholders some complaint would have been made, or some steps taken to have set aside some of the proceedings, or to have ousted those Directors from the position they claimed to hold, the duties of which they are assuming to discharge.

I think the facts shewn, together with the legislative recognition of the acts of the Company by the Statute of 1865, would certainly warrant us in holding that the usage to elect nine Directors for more than ten years had been sanctioned by the whole body of the stockholders, and that the Company cannot now, for the first time, be heard to raise the objection that the President and Directors of the Company, who were elected, apparently, without question, and who continued to act until after the debt to the plaintiffs was contracted without any objection, had no power, as such President and Directors, under their Act of incorporation, to bind the Company.

The next question is, assuming that the President and Directors of the Company, who were acting at the time the note sued on in this cause was given, had the power, under the defendants' Act of incorporation, to make promissory notes, have they exercised that power in such a way as to bind the Company?

Section 73 of the Consol. Stat., ch. 65, enacts that "the Directors by a resolution entered upon the books of the

Company, and without the formality of passing a by-law, may from time to time, as they see fit, authorize the President or Manager of the Company to sign such particular bonds, mortgages, contracts or instruments, as it may in the opinion of the Directors be necessary or expedient so to sign, and to affix the common seal of the Company thereto.

Sec. 74. "The President or Manager of the Company, to be from time to time authorized as aforesaid, may draw, sign or accept such promissory notes or bills of exchange for the purposes of the Company, without seal, as in the opinion of the Directors it may be necessary or expedient so to sign or accept."

Sec. 75. "All such bonds, &c., signed and sealed by the person authorized as aforesaid, and also such notes and bills so signed, drawn or accepted by the person authorized as aforesaid, shall be valid and binding on the Company, and be held to be the act and deed of the Company; but such bonds, bills, &c., as aforesaid, shall not exceed the amount which the Company are by the Act empowered to borrow."

It is not contended that the money obtained from the plaintiff was not properly obtained by the Company, nor that it has not been fairly appropriated to discharge the debts of the Company, nor is it denied that it has in that way been expended for their benefit. No reason is suggested why they should not pay the money, but the bald technical one that the Directors of the Company, who must have known the notes were given, for they were all entered in the books of the corporation, and who in fact authorized the giving of notes like the one sued on, did not authorize the signing of this particular note, and therefore the plaintiff is to lose his money.

I do not think that we are compelled to aid this corporation in doing so unreasonable a thing. It seems to me that the doctrine laid down in *The Royal British Bank v. Turquand* applies to this case.

In that case the party giving the bond sued on was a Joint Stock Company, registered under the Imp. Stat. 7 and 8 Vic. ch. 110, and incorporated for the purposes of working

mines, &c. The deed of settlement, amongst other things, authorized the Board of Directors of the Company to borrow money, and that none of the co-partners except the Directors or Secretary, acting under the lawful order of the Board of Directors, should give any bill, bond, note, &c., on account of the Company. The fiftieth section of the deed authorized the Directors to borrow on mortgage, bond, &c., in the name of and, if necessary, under the common seal of the Company, "such sum or sums of money as shall *from time to time*, by a resolution of a general meeting of the Company, be authorized to be borrowed."

The defendants in their plea, after setting out several of the clauses of the deed of settlement, averred that no resolution of any general meeting of the said Company was at any time passed authorizing the making of the said writing obligatory, and that it was given and made without the authority of the Company.

The bond was given to plaintiffs to secure the payment of moneys borrowed by the Company from the Bank, which was to be drawn out from time to time as usual amongst the customers of Banks.

The plaintiffs, in their replication, set out a resolution passed by the Company before the giving of the bond, as follows, "That the Directors should be and were thereby authorized to borrow on mortgage, bond or otherwise, such sums for such periods and rates of interest as they might deem expedient, in accordance with the deed of settlement and Act of Parliament."

In the argument in the Exchequer Chamber it was urged for defendant that the fiftieth clause of the deed of settlement limited the power to borrow on bond to such sums as the general meeting of the Company authorized the Directors to borrow. Lord Campbell said, "But since the Directors can acquire such a power, you must produce an authority shewing that the parties taking bonds must look at the resolutions."

Lord Campbell, in giving judgment, said: "Looking at the resolution set out in the replication, there seems ground for

contending that rule 50 in the deed of settlement was substantially complied with, and that the Directors may be considered as having had authority to execute the bond; but, at all events, we think that the bond cannot be rendered illegal and void from any irregularity in the proceedings of the Company, nor even by an excess of authority, the plaintiffs having acted with good faith, and the shareholders not being prejudiced. The plaintiffs have *bonâ fide* advanced their money for the use of the Company, giving credit to the representations of the Directors that they have authority to execute the bond, and the money which they advanced, and which they now seek to recover, must be taken to have been applied in the business of the Company, and for the benefit of the shareholders. If the plaintiffs must be presumed to have had notice of the contents of the registered deed of settlement, there is nothing there to shew that the Directors might not have had authority to execute the bond as they asserted."

All this language appears to me to be pertinent to the case before us. The plaintiffs here, by looking at the Act of incorporation of defendants' Company, see that the Directors are authorized to borrow money, and that they may authorize the President to sign notes, and are they not justified in giving credit to the President's representations that he has authority to sign the notes?

In the Exchequer Chamber, in the same case, reported in 6 E. & B. 327, Jervis, C. J., in giving judgment, said: "My impression is, though I will not state it as a fixed opinion, that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement; * * * and the replication shews a resolution, passed at a general meeting, authorizing the Directors to borrow on bond such sums, for such periods, and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough * * * We may now take for granted that the dealings with these Com-

panies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the Statute and the deed of settlement. But they are not bound to do more; and the party here, on reading the deed of settlement, would find not a prohibition, but a permission to do so, on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

I have already referred to the seventy-fourth section of the Consol. Stat., as authorizing the President to sign notes under certain circumstances, and the witness at the trial proved that on 10th April, 1866, it was resolved "that the President, and in his absence, the Vice-Presidents be authorized to sign notes."

In this respect it resembles somewhat the proceedings in *The Royal Bank v. Turquand*, and may perhaps be held sufficient, though no doubt the provisions of the Act incorporating defendants' Company are more particular than in the fiftieth section of the deed of settlement of the Joint Stock Company, in the case referred to. I think, on the whole, as that case has not been overruled or questioned, as far as we know, we may decide that it is authority to justify us in holding that either the resolution referred to sufficiently meets the requirements of the Statute, or that the notes are binding on the Company, inasmuch as the Directors of the Company may confer the statutory right on the President to sign notes to bind the Company. When such notes so signed are produced to a person who takes them in good faith, as security for money due him, which has been applied to discharge the liabilities of the Company, and so for the benefit of the shareholders, we think he may presume that the proper authority has been given by the Directors authorizing the President to sign the note, and may well act on such presumption, and having thus become possessed of the note, he may legally enforce the payment of it against the Company.

Rule discharged.

THE COMMERCIAL BANK OF CANADA V. SMITH ET AL.

Trespass q. c. f.—Certificate on married woman's deed—1 Wm. IV., ch. 3—2 Vic. ch. 6—C. S. U. C. ch. 35, sec. 13.

The certificate on a married woman's deed was, in these words, I, A., Judge of the * * do hereby certify that on this 13th day of January, 1849, at * in the said * * the within deed was duly executed in the presence of M. of * merchant, and D., of * merchant, by the within named Margaret, wife of L., within named, and that the said Margaret, at the said time and place, being examined by me apart from her husband, did appear to give her consent, &c., &c."

Held, that as the Judge could not have certified that the deed was executed in the presence of the witnesses, who subscribed it, without being himself present, and as, when he certified to her consent to depart with her estate at the time of the execution of the deed, he was unquestionably certifying to a fact of which he had been a witness, and on the presumption that he knew the law and did his duty, the inference was that the certificate was executed in his presence, as required by 1 Wm. IV., ch. 3, and 2 Vic. ch. 6, under which it was given; but if the certificate was defective in form, effect must be given to it under C. S. U. C. ch. 35, sec. 13, as it had been made before 4th May, 1849.

Trespass quare clausum fregit, to try whether a triangular piece of land was part of lot E, claimed by defendant, or part of lot H, in the Canada Company's survey of the town of Stratford, as claimed by plaintiff.

Defendants pleaded—1. Not guilty. 2. Not the land of plaintiff. 3. The *locus in quo* defendants.

Issue.

A suggestion was entered on the record that John Sydney Smith, the other defendant, had died on the 13th day of June, 1867.

The cause was tried before the Chief Justice of Ontario, at the last Fall Assizes for the County of Perth,

The plaintiff proved a good paper title to lot H, subject to the question whether a deed, dated the 13th day of January, 1849, from one Linton and wife, had a proper certificate of the County Court Judge endorsed upon it, that she as a married woman had conveyed the land.

Before the case closed it was admitted that this paper title included the *locus in quo*.

Leave was reserved to defendants to move to enter a nonsuit on the ground that the deed was bad.

The case then went to the jury as to whether the defendant had had possession of the land for twenty years, when they found for the plaintiff.

In Michaelmas Term last, *McCulloch* obtained a rule to enter a nonsuit, pursuant to leave reserved, and on other grounds unnecessary to mention.

C. Robinson, Q. C., shewed cause, citing *Orser v. Vernon*, 14 C. P. 573; *Tiffany v. McCumber*, 13 U. C. R. 159; *Monk v. Failinger*, 17 C. P. 41; 43 Geo. III. ch. 5; 59 Geo. III. ch. 3; 2 Geo. IV. Sess. 1, ch. 14; 4 Wm. IV. ch. 2; 2 Vic. ch. 6; 14 & 15 Vic. ch. 115; C. S. U. C. ch. 85; *Doe Bonter v. Savage*, 5 U. C. R. 223; *Beasley v. Cahill*, 2 U. C. R. 325; *Benns v. Eddie*, 2 U. C. R. 287; *Baby v. Watson*, 13 U. C. R. 533.

Anderson, contra.

J. WILSON, J. delivered the judgment of the Court.

As to the first ground, that the certificate of the County Court Judge, dated 13th January, 1849, does not contain any evidence that the deed had been executed by the said Margaret Linton in the presence of the Judge, and no other evidence was given of that fact.

The first Statute which enabled married women to convey their estates was the 43 Geo. III., ch. 5, which made it lawful for her, being above the age of twenty-one years, with the knowledge and consent of, and by any deed or deeds jointly with, her husband, to convey her estate, with a proviso that it should have no effect to bar her or her husband unless she appeared in open Court in the Court of King's Bench, or before any Judge thereof at his Chambers, or before a Judge of Assize at the sittings for the Home District, or on his circuit, and was examined by the said Court or Judge touching her consent, and should freely and voluntarily, and without coercion, give her consent before such Court or Judge to alien and depart with such estate; nor unless such examination should take place within six months from the time of the execution of such deed.

Under this Statute the certificate was to state the day on which such examination was taken, and that such married

woman did fully and freely consent to depart with, alien and convey her said real estate, without coercion or fear of coercion on the part of her husband, or any other person. This Statute was repealed by 1 Wm. IV., ch. 3.

Next was the Statute 2 Geo. IV., 1st Sess. ch. 14, which gave the Quarter Sessions the same power to examine, and extended the term for such examination to any period within twelve months after the execution of the deed.

Next was the Statute 1 Wm. IV., ch. 2, repealing the 43 Geo. III. ch. 5, except as to past conveyances. This gave the same right to convey, and in the same manner, as the Statute it repealed; with this proviso, that such deed should not be valid or have any effect unless such married woman should execute the same *in presence* of one of the Judges of the Court of King's Bench in this Province, or in presence of a Judge of the District Court, or of the Judge of a Surrogate Court of the District in which such married woman should reside, or of two Justices of the Peace for such District, and unless such Judge or two Justices of the Peace should examine such married woman apart from her husband respecting her free and voluntary consent to alien and depart with her estate, as mentioned in the deed, and should on the day of the execution of such deed certify on the back of the deed, in some form of words, to the effect following, that on the day mentioned in the certificate, such married woman did appear before him or them, as the case might be, at the place to be named in the certificate, and being examined by him or them apart from her husband, did appear to give her consent to depart with her estate in the deed mentioned, freely and voluntarily, and without any coercion or fear of coercion on the part of her husband, or of any other person or persons whatsoever.

It must be here observed that this was the first Statute which required the deed to be executed in the presence of the Judge, or Justices of the Peace, and yet did not require that fact to be certified, and it provided that it should not in any case be necessary for such Judge or Justices to attest the execution of any deed as a subscribing witness.

The next was the 2 Vic. ch. 6. It enacted, that when

when any certificate upon the back of any deed executed by any married woman pursuant to the said Act (1 Wm. IV. ch. 3), should have been theretofore given on any day subsequent to the execution of the said deed, such certificate should be deemed and be taken to have been given on the day on which the said deed was executed; and such deed should be as good and valid in law as if such certificate had been in fact signed on the day of the execution of the deed to which it related, as required by the said Act, that the certificate to be endorsed upon any deed, pursuant to the said Act, should be to the following effect: “

do hereby certify that on this day of at the within deed was duly executed in the presence of by

wife of one of the grantors therein named; and that the said at the said time and place being examined by apart from her husband did appear to give her consent to depart with her estate in the lands mentioned in the said deed freely and voluntarily, and without coercion or fear of coercion on the part of her husband, or any other person or persons whatsoever”; and that the certificate should be taken as *prima facie* evidence of the facts contained therein.

The form given with respect to deeds executed in a foreign county is in substance like this 14 & 15 Vic. cap. 115.

The next Statute was 22 Vic. ch. 35 and the C. S. U. C., 22 Vic. cap. 85, where the form, or to the following effect, is given, “I, (or we, inserting the name or names, &c.,) do hereby certify, that on this day of at the within deed was duly executed in my (or our) presence by A. B. of wife of one of the grantors therein named, and that the said wife of the said at the said time and place, being examined by me, (or us), apart from her husband, did appear to give her consent to convey her estate in the lands mentioned in the said deed, freely and voluntarily, and without coercion or fear of coercion on the part of her husband, or of any other person or persons whatsoever.”

The 13th section enacted that whenever, before the 4th day of May, 1849, the requirements of the Acts of the former Parliament of Upper Canada, or of the Parliament of the Province of Canada, respecting the conveyance of real estate in Upper Canada by married women, while respectively in force, had been complied with on the execution by any married woman of a deed of conveyance of real estate in Upper Canada, then belonging to such married woman, such execution should be deemed and taken to be valid and effectual to pass the estate of such married woman in the land intended to be conveyed, although the certificate endorsed on such deed should not be in strict conformity with the forms prescribed by the said Acts, or any, or either of them.

The certificate on the deed is in these words: "I Arthur Acland, Judge of the Huron District Court, do hereby certify that on this thirteenth day of January, in the year of our Lord one thousand eight hundred and forty-nine, at Stratford, in the said Huron District, the within deed was duly executed in the presence of A. F. Mickle of Stratford aforesaid, merchant, and Charles Dickson, of the same place, merchant, by the within named Margaret, wife of John James E. Linton, within named, and that the said Margaret, at the said time and place, being examined by me apart from her husband, did appear to give her consent to depart with her estate in the lands mentioned in the said deed freely and voluntarily and without coercion, or fear of coercion on the part of her husband, or any other person or persons whomsoever."

The course of legislation on this subject is by no means unusual; imperfect at first, but amended from time to time, and changed to meet the requirements of an increasing population, who found much of the uncultivated lands the property of married women, who were the daughters of the original U. E. Loyalists.

There was no mode of levying fines to pass their estate, as practised in England. The first enactment was to enable married women, after they had executed deeds, with the assent of and with their husbands, but within six months,

to go before the Court of Queen's Bench or a Judge thereof. &c., and acknowledge that they had executed the deed voluntarily and without coercion or fear of it on the part of their husbands or any other persons, giving no form of certificate. The next Statute gives the Quarter Sessions power to examine, and extends the time to twelve months for the examination. The next Statute is to repeal these Statutes and take the power from the Quarter Sessions, and confine it to the Judges of the Queen's Bench, the Judges of the District and Surrogate Courts, or two Justices of the Peace, and to require that the deed shall be executed in the presence of one of these Judges or Justices, and certified on the day of the execution of the deed ; but in the form given no allusion is made to the fact of being executed in their presence, but it declared that it should not be necessary that they should be subscribing witnesses to the deed

It was found that the direction as to time was inconvenient, and the 2 Vic. cap. 6, enacted that if the certificate was given on a day subsequent, it should be taken to be on the day on which the deed was executed, and be as good as if the certificate had been signed on the day of the execution of the deed to which it relates, as the last Act had required. This, by implication, was nearly back to the former state. It virtually authorized the execution of the deed, not in the presence of the judicial authority, but made the examinations before him subsequently operate as a new execution in his presence, relating back to the day on which it had been executed. The form of certificate under this Act rather carries out the idea that the certificate shall state that it was executed in presence of the Judge or Justices by the wife of one of the grantors therein, on the day of her examination ; implying rather that the deed might have been executed and witnessed before that day, and executed by her at the time of her examination, in compliance with the Statute. Now it is clear that the deed before us was certified in supposed compliance with this Act and the 1 Wm. IV. What did these Acts require ? That the deed should be executed in the presence of the Judge or

Justices, and certified in substance as directed therein. What does this Judge in fact certify? That on the 13th day of January, 1849, the deed was duly executed by Margaret, wife of Linton, and in presence of the witnesses she subscribed the deed. Could he certify this without being himself present? And that she at the said time and place, that is, at the time of the execution of the said deed, and at the same place, "being examined by me apart from her husband, did appear to give her consent. &c." Can any one question that the Judge was certifying to a fact of which he was witness; and if witness, it was done in his presence? We are bound to presume the Judge knew the law, and we are bound to presume he did his duty. Now, these presumptions and the certificate all imply it was executed in his presence, and if so, the certificate contains all the Statute requires. But it is not so clear that this is the very form the Legislature intended at this time, and intended the word *myself*, after the words "in the presence of," as well as the names of the witnesses. We had not then the form which is given in the 22 Vic., for the form there is "was duly executed in my (or our) presence," not "executed in presence of," as before.

We are bound to presume everything in favor of a deed, as between grantor and grantee, and *a fortiori* as between a grantee and a stranger denying its operation.

But if the certificate be defective in form, we are bound to give it effect, for it was made before the 4th of May, 1849, namely, on the 13th January of that year. In form it requires only the word "myself," which by implication ought to be there, to make it complete.

Looking at the course of legislation, at the course of legal decisions to uphold deeds executed in good faith, as this was, and at the reason of the thing, we must hold this certificate good.

Rule discharged, with costs.

HENDERSON V. MORRISON.

Ejectment—Title.

Evidence that plaintiff had been in possession of the land and had been intruded upon by defendant, *Held*, insufficient to entitle plaintiff to succeed in ejectment, it appearing that the fee was still in the Crown, the plaintiff being in possession as a free grant settler, but without patent or license of occupation.

This was an action of ejectment to recover lot number one, in the 9th concession of the Township of Chandos.

The trial took place at the last Spring Assizes at Peterborough, before the Chief Justice of this Court.

The land was a free grant lot, on which the plaintiff was located on the 8th March, 1865, when he got a receipt from Mr. Carroll, the Crown Lands Agent at Peterborough, for a fee of \$5, for the location of the lot. The conditions of location, according to Mr. Carroll's instructions from the Department, were, that the settler should be eighteen years of age and over; that he should take possession of the land within six months; should build a house 16 x 20; reside upon it and clean and cultivate ten acres in the course of four years. The lot had been occupied before by one Morrison, who had abandoned it and gone away. The defendants claimed under him. After the location the plaintiff took possession of the lot and worked upon it; but the defendants intruded upon and put him off the land, when this action was brought to recover possession. The evidence, upon which plaintiff claimed to recover, was his having had possession and the right to it, which the locations above mentioned gave him.

The learned Judge left it to the jury to say whether the plaintiff was in possession of the land from the time he got the right to locate it up to the time the defendants turned him off, reserving leave to the defendants to move to enter a nonsuit, if on the plaintiff's shewing he was not entitled to a verdict.

The jury found for the plaintiff.

In Michaelmas Term last *Hector Cameron* obtained a rule *nisi* to set aside the verdict and enter a nonsuit, pursuant to leave reserved, on the ground that the plaintiff proved no legal title in himself, and was not entitled to recover; that a free grant location, before patent, such as the plaintiff held, was not such a title as would sustain this action.

C. S. Patterson now shewed cause, citing *Doe Hughes v. Dyeball*, M. & Mal., 346; *Doe Carter v. Barnard*, 13 Q. B., 945; *Henderson v. McLean*, 8 C. P. 42, 16 U. C. 630.

Moss, contra, cited *Armstrong v. Campbell*, 4 C. P. 15; *Cully v. Taylerson*, 11 A. & E. 1008; *Doe Lloyd v. Passingham*, 6 B. & C. 305.

J. WILSON, J., delivered the judgment of the Court.

The cases referred to by Mr. Patterson go this length, that ejectment may be maintained by shewing a possession from which evidence of title may be inferred. In *Doe Carter v. Barnard* (13 Q. B. 945) the plaintiff failed to recover, although she shewed she had been in possession thirteen years and her husband before her for eighteen years; for she failed to connect her possession with that of her husband by right of any sort. Referring to *Hughes v. Dyeball* (Moo. & M. 345) and to *Doe dem v. Martin* (Car. & Marsh. 32), Patterson J., says: "These cases would have warranted us in saying that the lessor of the plaintiff had established her case, if she had shewn nothing but her own possession for thirteen years. The ground, however, of so saying would not be, that possession alone is sufficient in ejectment, as it is in trespass, to maintain the action; but that such possession is *primâ facie* evidence of the title, and, no other interest appearing in proof, evidence of *seisin* in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was *primâ facie* evidence of his *seisin* in fee; and, as he died in possession and left children, it was *primâ facie* evidence of the title of his heir, against which the lessor of the plaintiff's posses-

sion for thirteen years could not prevail; and therefore she has by her own shewing proved the title to be in another, of which the defendant is entitled to take advantage."

In this case, the plaintiff shewed the title was in the Crown, thus destroying his own *primâ facie* evidence of *seisin*. If this plaintiff is the recognized locatee of the Crown, he can easily obtain a license of occupation under the 13th section of the C. S. C., cap. 22. The Commissioner of Crown Lands may issue under his hand and seal to any person wishing to purchase and become a settler on any public land an instrument in the form of a license of occupation; and such settler may take possession of and occupy the land therein comprised, subject to the conditions of such license, and may maintain suits in law and equity against any wrongdoer or trespasser as effectually as he could do under a patent from the Crown.

The evidence, we think, does not sustain this verdict: there will, therefore, be a nonsuit entered pursuant to the leave reserved.

Rule absolute to enter nonsuit.

SMITH V. PROVINCIAL INSURANCE COMPANY.

Insurable interest--29 Vic. ch. 28, sec. 7--*Pleading*.

Averment in declaration that at the time of the loss a mortgagee of the plaintiff was entitled to the benefit of a covenant in a mortgage, made by plaintiff before the making of the policy, to insure the property, and that the plaintiff sued as well for the benefit and on behalf of the mortgagee as on the plaintiff's own behalf, *Held*, not to vitiate the declaration.

Plea, that after the policy and before the fire plaintiff sold and conveyed all his interest in the property to a stranger, and that at the time of the loss the plaintiff had no interest in the property either on his own behalf or on behalf of the mortgagee in the declaration mentioned, *Held*, a good answer to the declaration.

Replication, on equitable grounds, that the alleged conveyance was only by way of mortgage and that plaintiff had a right to redeem, *Held*, a good answer to the plea, and no departure.

Quere, as to the effect of 29 Vic. ch. 28, sec. 7.

DECLARATION, on a fire policy, alleging loss of property

insured : *averment*, that at the time of the said loss Thomas Brock Fuller was entitled to the benefit of a covenant on the part of the plaintiff, contained in a mortgage of the said property made by the plaintiff to him before the making of the said policy, to insure the said property against loss or damage by fire, and that the plaintiff brought this action as well for the benefit and on behalf of the said Thomas Brock Fuller as on his the plaintiff's own behalf.

Plea, that after the making of the policy and before the fire plaintiff sold and conveyed his interest in the insured premises to one Brownlee.

Equitable replication, that the conveyance to Brownlee was only by way of mortgage, and that plaintiff was entitled to a re-conveyance from Brownlee upon paying the moneys secured by the said mortgage.

Demurrer to 1st plea, that the said plea did not answer the action under the facts in the declaration set out ; that the plaintiff was by 29th Vic. ch. 28, sec. 7, entitled to maintain the action for the benefit of the said Thomas Brock Fuller.

Demurrer to replication : That it was a departure from the declaration, and that if the plaintiff had any claim against the defendants (which was denied) it should have been made in a Court of Equity and not in a Court of Law, as the said replication admitted the truth of the said first plea and in no way answered it, and the plaintiff should have begun in equity ; and it admitted all plaintiff's interest assigned, and was no answer even in equity ; and under any circumstances was only an answer in equity, if even good there, to a part of said first plea, so far as related to the said deed therein mentioned, and was no answer in any Court to the gist of the said plea, that at the time of the said loss or fire, the plaintiff had no interest in the said insured property ; also, that it was contradictory to the declaration in so stating said conveyance to said Brownlee, when a prior claim or interest therein was stated in said declaration to have been in said Thomas Brock Fuller.

Exceptions to declaration : That the interest of plaintiff

was not shewn or averred therein in said insured property at the time of said loss or fire; nor was any interest of plaintiff shewn therein at any time; nor was any reason given therein why said Thomas Brock Fuller claimed any interest in said policy, or assignment of said policy to him by plaintiff; nor was any consent of defendants thereto shewn, nor any privity between him and the defendants; nor any sufficient cause shewn to entitle him to receive any of said insurance money, or to entitle plaintiff to maintain the action as a trustee for him or for his benefit; nor that said Thomas Brock Fuller had any interest in said insured property and in said policy at the time of said loss or fire; nor why his name was introduced into said declaration; and no Statute was shewn to be in force relating to his rights affecting defendants, nor doing away with any defence defendants had in the action as against plaintiff; and if plaintiff was not entitled to recover, neither was said Thomas Brock Fuller, either in his own name or in that of plaintiff, as trustee for him, or for his benefit.

C. S. Patterson, for plaintiff, cited 29 Vic. ch. 28, sec. 7; *Prince v. Brunatte*, 1 B. N. C. 435; *Gledstone v. Hewitt*, 1 C. & J. 565; *Milligan v. Eq. Ins. Co.*, 16 U. C. 314; *Heckman v. Isaac*, 6 L. T. N. S. 383; *Davis v. Home Ins. Co.*, 24 U. C. 364, S. C. in App.; *Hutchinson v. Wright*, 25 Beav. 444; *Marks v. Hamilton*, 7 Ex. 323; *Pooley v. Harradine*, 7 E. & B. 431; *Powles v. Innes*, 11 M. & W. 10; *Sparks v. Marshall*, 2 B. N. C. 774; *Sadlers Co. v. Badcock*, 2 Atk. 554; *Lynch v. Dalzell*, 4 B. P. C. 431; *Park v. Phoenix Ins. Co.*, 19 U. C. 110; *London Invest. Co. v. Montefiore*, 9 L. T. N. S. 688; *De Ghettoff v. Lon. Ins. Co.*, 4 B. P. C. 436.

Burns, contra, cited *Ex parte Leeney and Evenden, re Barker*, 10 L. T. N. S. 697; *Thames Iron Works Co. v. Royal Mail S. P. Co.* 8 Jur. N. S. 100; *Jacobs v. Eq. Ins. Co.*, 17 U. C. 35.

RICHARDS, C. J., delivered the judgment of the Court.

I think the replication not defective under the authorities

referred to—*Winstone v. Linn* (1 B. & C. 460); *Prince v. Brunatte* (1 Bing. N. C. 435), and *Gledstone v. Hewitt* (1 C. & J. 565, S. C. 1 Ty. 445). Neither the declaration nor the pleas shew that any change in plaintiff's interest in the insured premises would avoid the policy, and all that is necessary, as I understand the authorities, to enable plaintiff to maintain the action, is to shew that he has an insurable interest in the premises at the time of effecting the insurance, and at the time of the loss. The replication shews that plaintiff had an equitable interest in the premises at the time of the fire, and that in fact the effect of his conveyance and the retaining of possession by him was merely to give to Brownlee security on the property, in case he had been compelled to pay anything on account of the plaintiff. I suppose that we must look at the real transaction when discussing the question of insurable interest, and the authorities seem clearly to indicate that an equitable interest is in fact an insurable interest. *Davis v. The Home Insurance Company* (24 U. C. Q. B. 364), and same case in Appeal, and the cases therein referred to, seem to establish this.

As to the demurrer to defendants' plea, the averment in the plaintiff's declaration, that at the time of the loss Dr. Fuller was entitled to the benefit of a covenant to insure, contained in a mortgage made to him by the plaintiff before the making of the policy, if a mere covenant to insure is sufficient to create an insurable interest, as stated by Crompton, J., in *Heckman v. Isaac* (6 L. T. N. S. 383) in a lease, I suppose it would equally extend to a mortgage; but, as at present advised, I do not see how the 7th section of the Statute (29 Vic. ch. 28) can make the allegation in plaintiff's declaration good against the substantive averment in the defendants plea, that at the time of the fire the plaintiff had not any interest in the insured property, either on his own behalf or on that of Fuller, or as his trustee, nor had Dr. Fuller any such interest therein, or in the said policy, as in the declaration alleged. There is of course more matter in the plea which might raise the question, whether under the mortgage he had such interest. Now, the objec-

tion taken to the plea is, that the plea does not answer the declaration, as, under the facts set out, the plaintiff is by virtue of the Statute referred to entitled to maintain the action for the benefit of Dr. Fuller; but if Dr. Fuller or plaintiff had not any insurable interest in the property at the time of the fire, the defendants would not be liable. I think, therefore, the plaintiff's demurrer to defendants' first plea is bad, as also defendants' demurrer to plaintiff's replication.

As to the objection to the declaration, if it can be properly brought up on the view we take of the rest of the proceedings, I do not see how the averment of Dr. Fuller's having a covenant to insure in his mortgage can make plaintiff's right to recover bad. It appears to me, if the allegation is not proper, it may be struck out, and in the view we take it is not necessary to enable plaintiff to maintain his action.

The only question is, whether the reference in the declaration to the covenant made by plaintiff to Dr. Fuller, and the interest arising under it, can be considered as stating one right, in which plaintiff would claim to maintain the action, and the replication would shew another. The allegation in the declaration is that he brings the action as well on behalf of Dr. Fuller as on his own behalf.

The replication displacing that part of the plea which relates to the conveyance of his interest to Brownlee, does not shew that he did not bring the action on his own behalf, and therefore in that view rather confirms the declaration than departs from it. We think the declaration good against the objections.

I am not prepared to say that an averment in the declaration, connected with the clause of the Statute to which we were referred, would shew that plaintiff would be bringing his action on behalf of Dr. Fuller. The covenant to insure may be and probably is of such a character as would make plaintiff expend the money in rebuilding, or perhaps in paying off the mortgage money, but the covenant is not necessarily of such a character as to make the plaintiff sue on behalf of Dr. Fuller: if it does not, I fail to see how

the section of the Statute referred to would so compel or authorize him to sue.

Judgment for defendant on demurrer to plea, and for plaintiff on demurrer to replication and declaration. (a)

THE CITY OF HAMILTON V. MORRISON.

Trespass—Land conveyed to Corporation as a market—User by public as a highway—Ineffectual dedication.

A block of land in the City of Hamilton, extending from John Street to Hughson Street, was conveyed to the Corporation for the purposes of a public market, a strip across the entire northerly side of which had been used for over twenty years as a passage way or sidewalk; but this strip was not separated from the rest of the block except by a kind of ditch, the earth from which mainly formed the sidewalk and raised it above the level of the rest of the block. This sidewalk had been recently narrowed and planked like the ordinary sidewalks of the city. A public market building had been erected on the southerly part of the block and used as such for about thirty years. The defendant and others, who owned the land adjoining to the sidewalk on the north, had erected buildings thereon fronting or facing on the sidewalk and nearest block, which buildings were generally occupied as taverns. and to some of which there was no access except across the sidewalks. The city authorities, for some unexplained reasons, had recently erected a close board fence on the extreme northerly boundary of the sidewalk from street to street, thus effectually obstructing the doors and windows of said buildings and cutting off all access to one or more of them. The defendant, being one of those injuriously affected by the board fence, cut it away, contending that he had a right to enter upon the sidewalk from any part of his land adjoining to it, as long, at any rate, as it was permitted to be used as a public way either for carriages or foot passengers, and in trespass for cutting away the fence he pleaded several pleas, alleging the *locus in quo* in some to be a carriageway and in others a footway, relying on the public user for over twenty years:

Held, that the city authorities, being in the position of trustees, were incapable of dedicating any part of land to the purposes of a highway, or of diverting it in any respect from its original purpose of a public market, and therefore no such dedication could be presumed from any length of user they might permit or had permitted; and that, acting on behalf of the public, from the nature of their trust, they necessarily retained such a power of control as would justify the erection of the fence in question.

TRESPASS, for breaking and entering the southerly ten feet of lot No. 94, on John Street, according to George

(a) Vide *Smith v. The Royal Ins. Co.*, 27 U. C. 54, where the decision is the same.

Hamilton's survey, in the City of Hamilton, and tearing down and destroying the fences.

The defendant pleaded eleven pleas, but it was admitted on the argument that the third, fifth, sixth, seventh, ninth, tenth, and eleventh, need only be considered.

The third plea set up a prescriptive right of way in defendant on foot and with carriages, by twenty years user, over the *locus in quo* from his land to a public market and market-house.

The fifth plea was like the third, only confining the right to a footway.

The sixth plea was that the *locus in quo* was a public highway, and because the plaintiffs' fences were wrongfully obstructing it the defendant entered and tore down the same, doing no unnecessary damage.

The seventh plea was that there was a public *footway* over the *locus in quo*, &c., as in the sixth plea.

The ninth plea was that defendant had the right, by twenty years user before action, to go and pass from all parts of the southerly side of land and a dwelling-house of the defendant adjoining the plaintiffs' close on the northerly side thereof, over, upon and across the northerly part of the plaintiffs' close towards a public market and market-house, situate on the southerly part thereof, and thence back again on foot; and that defendant entered to remove the fences wrongfully erected on the northerly limit of plaintiffs' close, obstructing the said right, and tore down the fences thereon.

The tenth plea was that the close in which, &c., formed part of a public-market and market-place, and consisted of the southerly part of lot No. 94, in the City of Hamilton, and adjoined and abutted upon a certain close, "now of the defendant," consisting of the northerly part of said lot 94, and before plaintiffs had anything in the close, on which, &c., and at the time of the making of deed therein-after mentioned, one James Gage, whose estate in the said northerly part of said lot defendant then had, was seised in his demesne as of fee, as well of and in the close

in which, &c., as also of and in the said close then of defendant, and being so seised said James Gage long before said time, when, &c., to wit, on the 10th of April, 1833, by a certain deed poll, for a mere nominal consideration, and for the purpose of a public market-place only, and for no other purpose, granted and conveyed said close, in which, &c., to plaintiffs and their successors for ever, upon the terms and conditions thereafter mentioned and subject thereto, and not otherwise, that is to say, that said James Gage, his heirs and assigns, occupiers of said close, then of defendant, should and might at all times at their free will and pleasure, go and pass on foot and with their teams and cattle from all parts of the southerly limit of said close, then of defendant, over and across said close, in which, &c., towards the southerly part of said public market and market-place, and thence back again, &c., for the more convenient occupation thereof; and the plaintiffs then took and have had ever since held and still hold said close, in which, &c., for the purpose and upon the terms aforesaid, and not otherwise; and because said fences, before the time of the alleged trespasses, had been wrongfully placed and were then standing on the northerly part of the close, in which, &c., and near said close, then of defendant, so that by reason thereof defendant, then being in occupation of his said close, could not pass, &c., without tearing down the said fences, he, defendant, at the time, when, &c., in order to remove said obstruction, entered upon the close, in which, &c., where said fences then stood and tore down the same, doing no more than was necessary for that purpose, which were the alleged trespasses complained of.

The eleventh plea was that long before and at the time when, &c., the close, on which, &c., was and formed the northerly part of an open public market and market-place in the City of Hamilton, commonly known as the John Street Market for all her Majesty's subjects as of right to frequent and enter upon and return from the same upon and along the northerly side thereof at all times, at their free will

and pleasure, and the same had been theretofore laid out and dedicated to, and at the time of the alleged trespasses, was held by plaintiffs for the purposes and on the terms aforesaid, and not otherwise; and because said fences before the time, when, &c., had been wrongfully erected upon and along the whole of the northerly side of said open public market and market-place, for the purpose of wrongfully closing same on that side, and did wrongfully obstruct the entrance to said open public market and market-place along the whole of the northerly side thereof, so that by reason thereof Her Majesty's subjects could not frequent and enter upon said open public market and market-place, on or along the northerly side thereof, he, defendant, in order to remove said obstruction, then entered and tore down said fences, doing no more than was necessary for the purpose, which were the trespasses complained of.

The cause was tried at the last Spring Assizes in Hamilton, before Hagarty, J.

The deed of 5th of May, 1834, to plaintiff's predecessors was put in.

Thomas Bligh, P. L. S., said he had lived in Hamilton for many years: knew market: had surveyed it; knew the deed when he made survey: property conveyed by deed was represented on the plan: fence on corporation property: place open as a market for thirty years: not sure as to northern boundary, but thought it had been all open for a market: also had the deed produced to him from Hamilton and others to the city, dated April, 1833: the line at Hughson Street where the plaintiff's fence was put up was ten feet south of northern line of land conveyed for a market; defendant's lot ran the whole depth of the market, his shop fronting on John Street, all the fence being on plaintiffs' ground.

This was the case for the plaintiffs.

For the defence, William Addison said he had been in Hamilton since 1842: knew defendant's store on John Street: the house there before he came: it was thirty-seven feet from John Street back; then came Seager's tavern facing the market: building there a long time:

when he came this was a public market-building : in its stead another market-building had been erected : then came an open driving-shed used with the tavern ; then came a stable : these put up since he came : entered from the open ground or market-square ; the door there still as it always was : no other entrance except from market : not sure when tavern was built : knew sidewalk from John to Hughson Street along northern boundary : seven or eight years there : put up by plaintiffs : gravelled by plaintiffs : used to be a much wider sidewalk ; before this there was a mud sidewalk along by defendant's lot, as long as he remembered, and a gutter was there for the water : there was a saloon under defendant's shop, and entrance was on the market about twelve feet from John Street.

In cross-examination he said :

People went over the ground as they liked : saloon entrance no longer there nor for three years : corner building moved five or six feet nearer to John Street about three years : as long as twenty years and over barn or stable had a door, from which an entrance was from the market.

George Tait said he went to Hamilton in 1835 : knew defendant's store : put up about two years after witness came : helped to raise it : Gage then owned it : Buckland occupied ; so did witness, twenty-five years ago, for a time : remembered barn, called the red barn : killed there in 1838 : was there when he came to Hamilton : door in building was from market-square : had been there fourteen or fifteen years : before that entrance into barn was through yard for the market, where present shed stands, and then turned into the barn : people used all parts of the market then : remembered defendant coming to live there : Cosgrave then occupied tavern : tavern there fourteen or fifteen years : before that was a yard into which entrance was from square : had been a sidewalk there six or seven years ago, gravelled from John to Hughson Streets [admitted to have been done by the Corporation] : a gutter all the way along to carry away the water many years before, and mud thrown up for a sidewalk twenty-nine or thirty years.

On cross-examination :

Ground, on which tavern built, used as a yard for front building : shed opened to market : shed there fourteen or fifteen years : no entrance from Peel Street : when used to drive in the shed was put over it, and could drive through still : at present entrance cut off by fence from shed and barn or stable.

William Allen said he had been many years in the plaintiffs' employ : commenced in 1846 : was street inspector : was eight or nine years in employ : did not remember sidewalk there : remembered grading market-ground, draining it, &c.

John Porteous said he knew tavern : one Hill put up back kitchen to front building about fourteen years ago, a short time before he died : witness lived in part of John Street building, in January, 1846 : tavern not then built.

In cross-examination he said it was all then a yard from front building to barn : fence ran from front building to barn and then entered the yard by a gate from the market-block : was also cellar door from side of front building into market : no door then at end of barn into market : present door put there about thirteen years ago : before that entrance from yard where shed afterwards put up : no entrance from Peel Street : only entrance to yard was from market, except a back door from house.

David O'Keeffe, P. L. S., said he made plan produced : measurements made on ground correct : dotted lines represented where coping stones were at south side of sidewalk : present fence cut off all access to market : fence four or five feet.

License from the Corporation for a tavern to Cosgrave put in.

Cosgrave said he kept tavern in this place for about five years in back place : had a license from City, which he transferred to Seagrave, who still kept tavern.

[Licenses put in for other persons on the square not on this lot.]

No access thereto except from market-square : tavern

posts west of defendant's lot, and fence cut him off and he had to leave.

The defendant's title was admitted.

It was then agreed for the purposes of the suit that the fence was on the true northern boundary of the market block: that the defendant should have leave to add two pleas on which the plaintiffs should take issue: that the learned Judge should direct a verdict for the plaintiffs for one shilling damages, with the usual certificate as to the trial of a right, and defendant have leave to move to enter nonsuit or verdict for him, if the Court should think on the evidence that the plaintiffs could not recover, and be at liberty to draw the usual inferences of fact as a jury might.

Verdict for plaintiffs one shilling damages.

In Easter Term last *M. O'Reilly*, Q. C., obtained a rule to set aside the verdict and enter it for defendant on some one or more of the issues, or a nonsuit, pursuant to leave reserved, on the law and evidence; or for a new trial, that the point in controversy might be more fully investigated before a final judgment thereon, which would exclude defendant in all time to come, the question in controversy not having been fully investigated, as appeared by the affidavits filed.

In Michaelmas Term last *Burton* shewed cause:—

The defendant contends that the part of the market ground adjoining his land was dedicated as a public highway, and if this be not maintained, then that he has acquired a private way across it from and to his place by prescription; and that under any circumstances plaintiffs had no right to erect the fence and to exclude defendant from any use he could make of the whole of the market-plot.

The plaintiffs answer that for convenience to the public, to make the market more serviceable, they constructed a footway, where the land had been low and swampy, along the south part of the market ground opposite to town lot

No. 94, ten feet of which lot is part of the market block, but not for the purpose of constituting that footway a public highway; and if that did constitute it a public highway, then they did not make it a highway for any other or different purposes than for market service only.

The ground was a market, and making a footway along it was not for the purpose of taking so much of the market area away from it, and converting it into a public highway for general highway purposes.

The owner of lot No. 94 conveyed the ten feet, part of the footway at the rear of his lot, to the predecessors of the plaintiffs, and he reserved no rights upon or across it for access to or from the market, or for any other purpose.

Plaintiffs cannot appropriate the market property to any other purpose than a market, and a dedication of the ground in question as a highway cannot be presumed against them, because it would be a breach of trust.

The whole market-square was open to the public, including the part of it in dispute, for market purposes, and no user of those parts which were travelled upon would make them a highway, nor would any such continued user ever ripen into a right to entitle the public to use them for such purpose only for ever.

He also filed the affidavit of Alexander Alexander, who lived on part of lot No. 94, adjoining the premises of the defendant, and also his own affidavit.

Alexander said that the north part of the market in question, which was low and swampy, was ditched several years ago, and the earth thrown up for an embankment for the use of the public; and a few years ago it was put more into shape as a walk or footway, by being gravelled and having curb stones placed in front; that he never heard till the commencement of this suit there was any pretence that this was a street or highway, "but that parties bringing wood or other articles for sale were entitled as a right to place their loaded wagons on any part of the said square, and that the pathway was raised to enable parties purchasing therein more conveniently to do so than

by walking through the mud and among the wagons; that of late years the parties living on the lots adjoining the market-square on the north had so infringed on the square itself, by leaving or allowing their customers to leave their empty wagons on and over the same, that the northern portion thereof became almost useless as a market, and it became necessary to interfere in some such method as was adopted by the Council, unless they were disposed to abandon its use as a market; that he had read the affidavit of John Bell filed, and he was quite incorrect in his description of the premises; that twenty-five years ago even, when he came to reside close to the market, the northern portion of it was so low and swampy that in wet weather it was almost impassable, and it was only after repeated ditchings and throwing out the earth, so as to raise a walk, that it became at all passable, and that the walk or pathway so made was made, he always understood and believed, in order to improve the market-square and make it suitable for the purposes for which it was originally intended.

Mr. Burton in his affidavit stated that the affidavit of John Triller filed by the defendant was incorrect in various respects, and he said, "I find by reference to the Corporation books the following to be the facts in relation to the said market place:—The late George Hamilton who was the owner in fee, where the market now stands, when laying it out into lots, reserved a square or piece of ground fronting on Hughson Street, for the purpose of a market, which piece of ground had a frontage on Hughson Street of 498 feet or thereabouts, and extended only to the centre of the block to the rear of the lots in the same block, facing on John Street and being bounded on each side by the rear of lots facing on Augusta and Peel Streets, as is shewn by the plan marked No. 1, hereto annexed.

Early in the year 1833 an act was passed to establish a Police and Public Market in Hamilton, in which it was provided that the majority of the Justices of the Peace in Quarter Sessions should select the market, which should

not be less than one acre. The parcel so laid out by Mr. Hamilton was not sufficiently large to come within the requirements of the Act, and the various owners of the lots adjoining the same accordingly proposed to convey a small strip forty links wide from the rears of their respective lots to the President and Board of Police of the town of Hamilton, which would have increased the said square, as shewn upon the plan hereto annexed marked No. 2.

The Magistrates in Quarter Sessions reported against the said market and the same was accordingly located in the centre of King Street, on what is now known as the King Street Gore, on the 13th of June in that year.

An action was thereupon brought by Mr. Hamilton against the members of the Board of Police, on the ground that the said Gore was dedicated as a public highway and could not be diverted from its original purpose, and he, as the owner of the fee, recovered in that action, and the project of erecting the market there was accordingly abandoned.

On the 5th of May, 1834, the late George Hamilton conveyed or assumed to convey to the President and Board of Police of Hamilton the parcel of land shewn on plan No. 3, hereto annexed, lying between the red line running through lot 117 and the dotted line through lots 94, 88 and 89 on said plan. I find that on the 1st of the same month the said George Hamilton conveyed to one William B. Proctor lot No. 117, with the exception of about three feet and the portion of the market-place in rear thereof extending through to Hughson Street, and about the same time conveyed to Elijah Secord the whole of lot No. 89; and that about the same time John Wilson conveyed to George Hamilton lot No. 104 on John Street, forming a portion of the present market, and that the said Hamilton subsequently acquired, for a valuable consideration, from William Freeman the ten feet of lot No. 94 adjoining the premises now owned by the defendant, and from one Owen lot No. 99 adjoining the same.

The said John Triller was attending the Court as a witness in this cause at the last Assizes and might then have been examined."

M. O'Reilly, Q. C., contra :—

The deed from George Hamilton to the President and Board of Police of Hamilton, of the 5th of May, 1834, does not say the land was given or conveyed for a market: it embraces all the land conveyed by the deed of April, 1833, from George Hamilton and others to the President and Board of Police, and somewhat more in order to make up the acre of land required by the Statute.

Although the whole area was granted, or intended or appropriated for a market, it was a perfectly lawful and proper use of a necessary portion of it to dedicate it for a sidewalk and public highway; and it was thus quite rightfully and without any breach of trust created a public highway. Erecting a market-house in the centre of the block and allowing all round it for so many years to be used as a highway has made it irrevocably a highway. If not a public highway, the defendant has at any rate acquired a title by long and uninterrupted user, a prescriptive title to cross to and from his place to and from the market, without the obstruction of a fence; and this right will in effect be as beneficial to him as if the *locus in quo* were a highway.

The plaintiffs, notwithstanding these rights of the defendant and others so acquired, might still under their municipal powers have continued to *regulate* the use of the ground, but they could not deprive the defendant entirely of his rights by erecting the fence which excludes him from the market.

The grantor of the rear ten feet of lot No. 94 and those claiming under him must have the right to step from their own property on to the public market; and they must in any case have had and still have a way of necessity to and from their place: *Gale & Whately* on Easements, 39, 40.

On the subject of markets and grants of way he referred to *The Town of Guelph v. The Canada Company*, 4 Grant 632, and to the two American decisions there referred to; also *The Trustees of Rugby Charity v. Merryweather*, 11 East 375, Note, and *The King v. Ward & Lyme*, Cro. Car. 266.

He read the affidavits of Ann McGlogan, John Bell and John Triller.

Ann McGlogan said that the sidewalk along the south of the defendant's premises, and extending from John Street to Hughson Street, was originally about twice its present width fifteen years ago and upwards: that between nine and ten years ago the plaintiffs gravelled the sidewalk and placed curb stones at the outer edge of it and paved the ditch; that it so remained till the fall of 1866, when the plaintiffs narrowed the sidewalk to its present width and laid down a plank covering on the gravel part, and erected the board fence in question upon the sidewalk close to its northerly limit from John Street to Hughson Street, and thereby cut off all access to certain taverns and buildings adjoining thereto on the north; that for the whole of the said fifteen years and longer she believed the sidewalk, including that part of it occupied by the said fence, had been used as a public thoroughfare by the public and by the occupiers of the land and buildings in the block adjoining thereto, on the north from John to Hughson Streets, as well for passing from street to street as from and to the said houses and buildings without hindrance, except that lately caused by the said fence, and that her husband and others took their respective premises in the belief and expectation that they were bounded on the south by the said sidewalk, and had a lawful right of access to their said premises over and across the said sidewalk from the market.

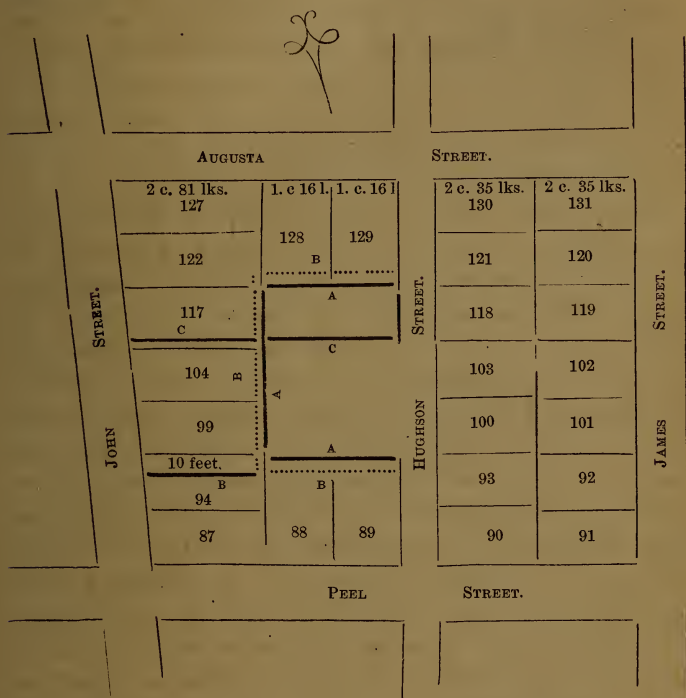
John Bell swore that the statements made by Ann McGlogan in the first, second and third paragraphs of her affidavit were true, and that twenty-five years ago he occupied part of the present premises occupied by the defendant west of and adjoining to John Street, immediately to the north of John Street Market; that twenty-five years ago there was a walk, road or thoroughfare leading from John Street to Hughson Street, adjoining the premises of defendant and others, the occupiers in the same block, wide enough to be used by foot-passengers and carriages, and then used in both ways by the public and the

said occupiers on the north, not only for passing from John to Hughson Street, but to and from their respective premises, without interruption from that time till the present, except the interruption caused by the said fence.

Triller stated that he knew the premises ; that he lived in the block, in which the defendant's premises were, from 1835 to 1850, and from about 1852 till 1856 ; that from 1835 to the present time the ground adjoining the premises of the defendant and others on the south formed part of a public thoroughfare, leading from John Street to Hughson Street, and was so used during all that time by the public and by the occupiers of the said block to pass from street to street as from and to the said premises in the block ; that from 1845 till about 1854 he owned and occupied, with other property in the said block, the lot No. 88, which adjoined the defendant's premises on the west and faced the market-square, and the part of it was so used as a thoroughfare as aforesaid, and during all that time he was in the habit of entering and passing to and from the south side of the said lot upon over and across the ground so used as a thoroughfare, without interruption and as of right, and the other occupiers in the said block did so too ; that he had been informed, and it was a matter of notoriety, that the previous owner of said lot 88 gave a piece of the southerly part of it, including part of the said sidewalk, on which walk the fence in question stood, to the Corporation of Hamilton for the use of the public, and there could be no doubt that such gift was made on the clear understanding that the owner of the said lot and his assigns should not thereby be cut off from the adjoining public market, or hindered from having direct access to the market from the said lot ; the south end of the lot having originally faced and adjoined upon the ground originally dedicated for a public market, as he was informed and believed, and that he acquired and subsequently sold that part of said lot 88 under the impression and belief that he and those claiming under him was and were and would be at all times entitled to pass to and from the

same upon and across the said sidewalk from all parts of the said lot.

The following sketch of the property represents the different plans which were filed at the trial and on the argument:



The lines A A A and Hughson Street bounded the Market as originally laid out by George Hamilton.

The dotted lines B B B and Hughson Street mark the boundaries of the Market contemplated by the deed from Hamilton and others, executed in April, 1833.

The lines C B show the south and north limits of the present Market Square, and Hughson Street and John Street, its west and east limits.

A. WILSON, J., delivered the judgment of the Court.

There is no doubt that a market was established in the City of Hamilton on the ground now occupied as a market,

between John Street and Hughson Street, many years ago,

It does not appear that the Justices of the Peace for the district ever formally adopted or established this market under the Act of 3 Wm. IV., ch. 17, sec. 28, although it appears, notwithstanding their report against it, and after they had failed to establish a market on the site they had selected for it, that Mr. Hamilton, the owner in fee of the present market block, conveyed it to the President and Board of Police by the deed of the 5th of May, 1834, and it appears soon after this to have been opened and used as a market from that time forward.

Then by the 2 Vic., ch. 45, the Town of Hamilton obtained power to establish a second market, which Act recited that "a market for the said town was established under and in pursuance of the said Act" (3 Wm. IV., ch. 17), and the 12 Vic., ch. 81, sec. 60, sub-sec. 6 conferred power upon the plaintiffs to "regulate and manage any existing market, and to establish, regulate and manage any new market, &c." So there is no doubt the present market, though not perhaps so formally adopted and created as it should have been under the Act of 1833, has been recognised by the Legislature as having been legally established under and in pursuance of the Statute in that behalf, and has been accepted and used as a market for upwards of thirty years by the governing body of the place, and it is therefore a legally established market to all intents and purposes.

The evidence given at the trial and the information laid before us in the affidavits filed has been set out at length, because this is a public matter of very considerable consequence, applying to all the markets of the Province, as well as of a good deal of consequence to the defendant and others as respects their private claims in and upon this particular market.

The defendant asserts the rights which he has set up to be secured to and exercisable by him, because the *locus in quo* is a public highway, or because he has a private way over it, or else a way of necessity.

The way of necessity may be at once disposed of.

There is no such way properly, unless there is the right to pass over adjoining lands where the proper line of road is foundrous: other ways which are generally described as ways of necessity are properly ways arising or supposed to arise by grant: 1 Saund. 323.

There was no such necessity in this case to give rise to the claim of the defendant, or of those he claims from, to have such a way.

I have found no way of necessity claimed, unless the owner or occupier of the premises, in respect of which the way is claimed, has had no other access to or from his property to some way or highway, and the cases usually put are those of the owner of two closes, one surrounding the other, granting one of them. In such a case, without any words of reservation or express grant, the owner of the surrounded close, whether he be the grantor or grantee, has a way of necessity, as it is called, from such close over the surrounding one to the public road: 1 Saund. 323 and notes: *Pinington v. Galland* (9 Exch. 1.)

A way of this description cannot be claimed, because it is more convenient than another way which the party has: *Dodd v. Birchall* (1 H. & C. 113); per Wilde, B. 122, "there is no foundation for such a doctrine."

And such a way is limited by the necessity which created it, so that if the party entitled to it should be able to approach the place to which it led, by passing through land of his own, which he subsequently acquired, the former way of necessity would be determined: *Holmes v. Elliott* (2 Bing. 76); *Pearson v. Spencer* (3 B. & S. 761, Exch. Ch. per Erle, C. J.)

When the owner of lot No. 94 conveyed the ten feet in rear of his lot to the predecessors of the plaintiffs he had still left to him the means of access to the public road, for the whole east side of the lot abuts on John Street, and he had by such means a way to the market, without claiming the right of passing over the whole or any part of the ten feet, which he had sold, in order to reach the market.

It may have been a more convenient way for his getting to the market, but mere convenience confers no such right, nor does it create a way of necessity. There can be no doubt that the grantees of this ten feet might have built a wall all along the north limit of their purchase, close to the rear boundary of lot 94, the moment they got it, for it became theirs, and there is no pretence for holding that they granted impliedly to their grantor a way over the whole of this strip for ever, or of necessity. This claim of right entirely fails.

As to the way by prescription, so as to confer or create the right of a private way, I think it is not proved. The evidence, if it establish anything, is not of a private but a public way: *Mildred v. Weaner* (3 F. & F. 30, 6 L. T. N. S. 225).

The right claimed is not to exercise any particular right in the market, such as the occupancy of a particular stall or place in the market, or to have a particular class of goods exposed for sale there, or to occupy toll or rent free, in which case a private right consistent with the purposes of the market might arise as against the plaintiffs, but it is to use a part of the market not for market purposes, but for private advantage, in a way in nowise connected with the market rights or purchase, but opposed to and in derogation of them.

The right, such as it is, must be determined not by the question whether a private right of way has been granted or has arisen against the plaintiffs, but whether there has been a dedication of the place in question as a public highway. If there has not been, and if that is so, because the market property could not be diverted from its original destination, then the claim of a way by prescription will fail equally with that of a public way.

But in the consideration of the right of a private way there is also this further reason against it, that the only user for which the defendant desires this right to be enforced is a user of the *locus in quo* in a manner not in anywise inconsistent with its having all along been part

of the public market; it was open to the user of any one without interruption so long as they created no interference with the market privileges; but these privileges were never stopped at any time, and the defendant has done no more than any one else has done or might have done, so long as no inconvenience was felt.

The principal question, however, is whether the plaintiffs have ever dedicated this portion of the market-block as a highway; and this will depend upon whether they had the power to do so; because, if they had the power, they may have done sufficient to establish it as a public way, though it would require more proof as against them under all the facts to establish that intent to dedicate such kind of property, which is usually thought to be sufficient in ordinary cases.

Whether there has been a dedication or not of a highway is to be gathered from the intention of the owner: *Barraclough v. Johnson* (8 A. & E. 99); *Reg. v. East Mark* (11 Q. B. 877).

It is a question of fact for the jury to be gathered from all the circumstances: *Reg. v. Petrie* (4 E. & B. 737); *The Company of the Proprietors of the Grand Surrey Canal v. Hall*, 1 M. & G., 392; and this intention is to be inferred from [among other matters] the situation of the title and the power of the owner to dedicate it or not for such a purpose.

The site was granted for a public market, and it has been used for such purpose from its creation. No doubt ways are necessary for its proper enjoyment and full use, to be constructed over it in different directions, and these ways the plaintiffs are bound to put into such order that they may be conveniently used for market purposes; but it does not follow that such ways, though used by the public, become public highways in the general sense of that term for all the liege subjects of the Queen to pass and repass upon at their free will and pleasure at all times.

Those who own land for certain specific purposes have no power to grant it or dedicate it for purposes inconsistent

with those for which the land is vested in them : *The King v. The Inhabitants of Leake* (5 B. & Ad. 469) is a direct authority on this point. Park, J., said : " If the land were vested by Act of Parliament in the Commissioners, so that they were thereby bound to use it for some special purpose incompatible with its use as a highway, I should have thought they would have been incapable in point of law to make a dedication of it."

Lord Denman, C. J., agreed with this opinion, but they both thought that the Commissioners could in that case grant the right of way on the top of the embankment they had formed, without affecting the usefulness of the bank for the purposes for which it had been thrown up.

Mr. Justice Littledale thought that the public way would be an interference with the principal object for which the bank was raised, and that the Commissioners could not, therefore, dedicate any part of it as a road. The whole Court agreed in the principle of law, but differed as to its application in that particular case. He said : " The Commissioners had no power to dedicate to the use of the public, as a highway, land which they were entrusted with the ownership of for a special purpose, and for which it may at some future period be required, and as all the King's subjects are presumed to know Acts of Parliament, they must when they used the road, be presumed to know that in point of law it could not be dedicated, and that it could only be used as a way of permission and sufferance ; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by Parliament, and which therefore could not be infringed upon."

So in *Prince v. Lewis* (5 B. & C. 363), where the owner of the market sued for selling out of the market and depriving him of his fees, the defendant set up that the owner had let parts of the market for purposes for which it had not been granted, so that there was no room in the market, and therefore he had the right to sell beyond its precincts without being liable for doing so, and the Court

decided in favour of the defendant. The Chief Justice said : "When the parts of the market were let, it may have been at a time when there was room to spare ; but by the increase of population and demand for market room these licenses have become illegitimate and unreasonable. If they are inconsistent with the appropriation of the space which the law contemplated for the benefit of the public, the owner must remove them."

Bayley, J., spoke to the same effect :

"Whenever the convenience of the public frequenting the market requires the whole space shall be devoted to the use of the market, then there is an obligation on the part of the proprietor so to dedicate it."

Littledale, J., said : "The grantee is not bound to extend the market over the whole of the soil : he may appropriate so much only of the soil as is sufficient for the purposes of the market, and he may shift and change the market to different parts of the space specified in the grant. The lord of the market has the direction of it, and he may direct the vegetables to be sold in one place, the fruit in another, and the flowers in another. So he may direct that carts should come to one place and baskets to another, by his general power ; but he is bound to appropriate the whole space to the purposes of the market, if the public convenience requires it."

It is a rule that to every franchise is attached the condition that it be not abused : *Com. Dig.* 'Condition,' R.

Then what are the duties of those who keep markets ?

They must provide convenient accommodation for all who are ready to buy and sell in them ; and they must devote the whole area of the market, if required, to market purposes only, as may be seen from what has been said ; and see also on the same point *Moseley v. Walker* (7 B. & C. 40) ; *The Mayor, &c., of Macclesfield v. Chapman* (12 M. & W. 23, note).

A breach of duty would in this respect, if the franchise were held by grant from the Crown, create a forfeiture, and furnish ground for a *sci. fa.* to repeal the patent ; and it

might also subject the owner of the market to an indictment for a misdemeanour. (12 M. & W. 23, note.)

In such a case, I presume, it would, from the authorities referred to, be a breach of duty to dedicate any part of the market as a highway for general purposes, without regard to the market rights, when the land so dedicated might be required for market purposes : See also 1 M. & G. 392, before mentioned.

I suppose there is no doubt, from what has been said, that a Municipal Corporation might grant a part of their market-block not required for a market, as long as it was not so required to be used by sufferance, as a highway for the general convenience of the public and of those frequenting the market. But, even if market-ground could be dedicated as a highway, it would, considering the tenure upon which the Corporation hold the property, and the specific purpose to which it was dedicated, and the forfeiture and punishment to which they are liable, if they do not afford the proper accommodation to the public, so far as the place permits, require an exceedingly strong case against the Corporation to establish the intention which is required in every case as against them, to constitute a dedication of such property for so different a purpose. But I think that public property specifically appropriated for a market cannot be so diverted ; for a highway, "if dedicated at all, must be dedicated in perpetuity, and once a highway always a highway, as the public cannot release their rights, and there is no extinctive presumption or prescription : " per Byles, J., in *Dawes v. Hawkins* (7 Jur. N. S. 262) ; and it would be impossible for the market rights to be exercised over the dedicated portion, according to the increasing population and requirements of the locality, if extended market accommodation became necessary.

In 1 M. & G. 392, before mentioned, a dedication was presumed against the plaintiffs of a bridge to the public generally, which had at first been used for the inhabitants of a particular locality, "because there was power in the constitution of the Company to make the dedication."

In *Ellis v. The Mayor, &c., of Bridgnorth* (9 Jur. N. S. 1078, 15 C. B. N. S., 52) it was determined that the plaintiffs might be presumed to have acquired the legal right from the defendants to erect a stall on market days opposite his shop for the exposure and sale of goods free of toll, and thus to advance his shop as it were into the market; and that he was entitled to recompense from them for removal of the market and depriving him of such right. In the case just mentioned his right was claimed to expose for sale in the market, and was claimed from immemorial usage, when it was said the right might have been granted to his predecessors as a compensation for his loss of custom in his shop on such market days; or else it might be presumed to have been secured to the plaintiff's predecessors by the original grant of the market, and is therefore, on the ground of *consideration* for the right, as on other grounds, widely different from defendant's claim in this suit.

I think then that the facts here shewed no dedication by the plaintiffs of this land as a public highway, but is more like the license to use the soil as a highway, so long only as it does not happen to be required for market purposes, for which it has been already dedicated, and resumable therefore when required for its original purpose—see *Barraclough v. Johnson* (8 A. & E. 99)—though it is still more like the user by sufferance and permission mentioned in 5 B. & C., 363, and therefore revocable and resumable at pleasure.

If this were a highway, the defendant could not justify the placing of wagons upon it, as it is alleged he has done, and standing them there as if it were his private yard. Such a use of the highway is a nuisance, for which he may be indicted, and no length of time would convert such a nuisance into a right: *Rex. v. Russell* (6 East 427); *Rex. v. Jones* (3 Camp., 230); *Rex. v. Cross* (3 Camp., 224); *Gerring v. Barfield* (16 C. B. N. S., 597).

After every consideration given to the case the conclusion I come to is, without any doubt, entirely adverse to the defendant's claim, on every ground on which it has been

placed; for there has been no dedication, nor prescriptive right, nor way of necessity, proved. The plaintiffs had not the power to misapply and abuse the franchise with which they were entrusted, and all they have done is to grant a permissive way to the public, so long as they choose to leave the way there; but they can alter the market in any way they please, by erecting stalls where the way is, and by changing the way to another place, or by closing it entirely, if they find it advantageous to do so; and in all respects they can exercise the same rights and powers at the present time, in like manner and to the full extent which they could have done on the day of the foundation of the market. The verdict for the plaintiffs should, therefore, be permitted to stand, and the rule of the defendant must be discharged.

Rule discharged.

WINCKLER (ADMINISTRATOR) V. THE GREAT WESTERN
RAILWAY CO.

*Railways and Railway Cos.—Accident—Negligence—Verdict against Railway
Co. set aside—Evidence.*

The plaintiff sued as administrator of his wife, charging in his declaration that by and through the carelessness and negligence of defendants, and for want of sufficient fences, &c., the locomotive and train of defendants were driven against a carriage in which plaintiff's wife was driving along the highway, from the effects of which collision she died. It appeared that plaintiff, with his wife and child and a couple of others, was returning from a pic-nic party, in a cab, along the highway, which at a certain place crossed defendants' line of railway. This crossing was not fenced, as required by law, and at the time in question a very long excursion train, no mention of which was contained in the Company's time-tables, was approaching at a rapid rate and came in collision with the cab, injuring plaintiff, his wife and child, and ultimately causing the death of his wife. The evidence shewed that the cab was being driven at a slow pace and up an inclined plane towards the railway track, which was considerably elevated above the highway: that though there were some slight obstructions in the way, the train could be seen for some five hundred yards from the crossing, but that neither the driver nor any of the party was looking out for the approach of trains, and in fact that the former did not see the train in question

until his horses feet were upon the track, when it was only some seventy yards distant from him; whereas a witness, who was one of plaintiff's party, stated that had he (cabman) been on the alert, they would all have been saved. It was further shewn that the driver knew the locality, having in fact driven plaintiff and party over it on their way to the pic-nic, and the preponderance of evidence was to the effect that the railway whistle was heard at a distance of three or four hundred yards from the crossing. The jury having, on this evidence, found for plaintiff,

Held, that he was not entitled to recover; for, though the not fencing of the crossing by defendants was negligence on their part and a disregard in that respect of their statutory duty, still it did not constitute such negligence *per se* that plaintiff must recover against them, however culpable he may himself have been, and though such want of fencing was not the cause or occasion of the accident: that to justify a recovery for such a cause, it must appear that the damage to plaintiff resulted from the omission to fence as the proximate, if not the direct, cause of the accident, which the evidence did not warrant in this case, but rather that such damage arose from his own gross negligence, or that of his driver, in not keeping a proper look-out for the train, which, with this precaution, it clearly appeared, could easily have been avoided.

In an action by plaintiff against the same defendants, in his own individual right, for injury sustained from the same accident, the Judge at the trial at first directed the jury that, assuming defendants to have been guilty of neglect in not fencing, they must determine whether plaintiff did or did not so far contribute to the accident by his own negligence or want of ordinary care and caution that, but for such negligence or want of care, the accident would not have happened:

Held, that this direction was right. But afterwards, at the request of plaintiff's counsel, who did not wish the question of contributory negligence to be left to the jury, the Judge, as he took the same view, did not charge them to find specially on the question of negligence generally, as applicable to the state of the road, when defendants' counsel objected; so that in the confusion which arose the question of community of default being understood to be withdrawn from the jury, they were led to believe that because defendants were in default, plaintiff must recover: on this ground therefore, the Court, Richards, C. J., *dissentiente*, granted a new trial without costs.

The plaintiff sued for damages for the death of his wife by the defendants' negligence, as stated in the head-note.

The pleadings were substantially the same in this and a similar suit brought by the plaintiff in his own right.

Both causes were tried at the Spring Assizes held at Hamilton, in 1866, before the Chief Justice of this Court. The evidence, which was very long, is sufficiently stated in the judgment of the Court.

At the conclusion of the plaintiffs case, *Freeman*, Q.C., moved for a nonsuit, contending that the plaintiff and his

wife must be considered as in the same position as the cab driver, and that if the neglect of the cab driver contributed to the injury, the plaintiff could not recover. He referred to *Stubley v. The London and North Western Railway Company*, L. R. 1 Exch. 13.

M. O'Reilly, Q. C., for the plaintiff, referred to *Tuff v. Warman*, 5 C. B. N. S.; *Tyson v. The Grand Trunk Railway Co.*, 20 U. C. R. 256.

The Chief Justice said: "I shall leave it as a question of fact to the jury to say if the plaintiff's driver was guilty of negligence, and substantially contributed to the accident by such negligence; and if the jury find in favor of the defendants on this point I shall give them leave to move to enter a non-suit, if the Court shall think that, in relation to the duties imposed on the defendants by the Statutes, as to fencing their line of way, such finding is a defence to the action."

The defendant then called witnesses and the plaintiff called Captain Nicholls in reply.

The Chief Justice directed the jury that, subject to the question raised as to the accident having been contributed to by the plaintiff's driver, he should ask them if the defendants or their servants were guilty of negligence in working or taking care of their road, or the highway, and if they were in relation to these matters, and if the accident occurred therefrom, then to find for the plaintiff.

The alleged negligence and want of care principally dwelt on by the plaintiff were:

1. The want of fencing.
2. The omission of the driver to look out for the cab.
3. The omission to sound the whistle continuously.
4. The incompetency of the driver of the engine.

His Lordship also further dwelt upon the great speed of the train at that place; the necessity of more caution in consequence of the unevenness of the highway thereabout; and this not being a usual train and passing at an unusual hour; which facts he left to the jury, stating that these latter circumstances afforded no very strong evidence of negligence.

The defendants' counsel objected to the learned Judge's charge, in telling the jury that the Company were bound to fence along their line of road across the highway.

The jury found a verdict of \$220 for the child, but nothing for the plaintiff himself.

They also found the driver of the plaintiff's carriage guilty of negligence, thereby substantially contributing to the accident.

In Michaelmas Term following, *Irving*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a non-suit, pursuant to leave reserved at the trial, on the ground of the finding of the jury that the plaintiff's driver was guilty of negligence and substantially contributed to the accident by such negligence; for a new trial, on the law and evidence; and for misdirection in this, that the Chief Justice should have directed a verdict to be found for defendants; because

1. The fences, which were built along the highway and were connected by cattle guards [there being no question raised that such fences and cattle guards were malconstructed, or were not of a proper description to protect the railway,] were a sufficient compliance with the Statute, which provided that the Railway Company "should erect and maintain sufficient fences upon the line of the route of the railway."

2. Admitting defendants were bound to fence, still there was a duty on the plaintiff to exercise due care and caution, and if the accident was the result of concurrent negligence on the part of both of them, that the plaintiff could not recover.

3. And for further misdirection in this, that no proposition for the consideration of the jury was submitted to them, by which they were asked to exclude the non-existence of fences being negligence connected with this accident; whereas the jury should have been asked whether the accident was not the result of plaintiff's negligence, irrespective of any negligence by defendants in not fencing.

4. The jury were told and improperly directed that defendants were bound, under the acts of Parliament affecting them, to fence laterally along their line and across the highway, such fence having gates thereon, and the jury were further improperly told and directed that defendants would be required to keep attendants to open the same.

5. The jury having found that, if there had been fences, the accident would not have occurred, did not establish the fact that the defendants might not be excused if the plaintiff's negligence had concurred in bringing about the accident, if there had been no fence required.

In Hilary Term following, *M. O'Reilly*, Q. C., shewed cause in both suits :—

The cases of *Renaud v. The Great Western Railway Co.*, 12 U. C. 408; *Parnell v. The Great Western Railway Co.*, 4 C. P. 517; *McDowell v. The Great Western Railway Co.*, 6 C. P. 180; have already established that these defendants are bound to fence their line of railway, and to fence it across the highway where their track crosses the highway on the level: if these decisions are wrong, the only remedy is by carrying the question to appeal.

The general Act of Canada, chap. 66, sec. 150, although passed since the above cases were decided, cannot be supposed to have repealed the particular provisions in the special acts of this Company.

The case of *Tuff v. Warman*, 5 C. B. N. S. 573, S. C. 5 Jur. N. S. 222, contains the general principles applicable to such a case as the present; also, *Tyson v. The Grand Trunk Railway Co.*, 20 U. C. 256; *Scott v. Dublin and Western Railway Co.*, 11 Ir. C. L. 377.

That the plaintiff was chargeable with negligence is no reason why he should not recover: *Clayards v. Dethick*, 12 B. 439; *Raisin v. Mitchell*, 9 C. & P. 613; *Lynch v. Nurdin*, 1 Q. B. 29; and even although the negligence appeared on the record: *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 244.

The defendants may rely on the class of cases, such as *Caswell v. Worth*, 5 E. & B. 849, where it appeared the

party suing for redress wilfully set machinery in operation, by reason of which he was injured; but it is clear they are not applicable here, because the plaintiff was lawfully using a common and public highway at the time of the accident.

Irving, Q. C., contra: The driver of the plaintiff's conveyance knew the locality of the accident well, and that no fences or gates were then across the highway; and it was his place to see that the railway track was clear before he attempted to cross it: *Stubley v. The London and N. W. R. Co.*, L. R. 1 Exch. 13.

A want of ordinary care on the part of the plaintiff is an answer to the action: *Caswell v. Worth*, 5 E. & B. 849. 855; *Senior v. Ward*, 1 El. & El. 385.

If no affirmative negligence be proved against the defendants, the plaintiff must fail: *Deverill v. The Grand Trunk Railway Co.*, 25 U. C. 517.

There was no evidence whatever of negligence proved against the defendants, unless such as arose from the alleged want of fencing; but the want of fences cannot alone give the right of action, unless it was such want of fences that led proximately to the result.

As to the question of fencing, the Court must no doubt be bound by the previous decisions referred to, though the 150th section of the General Railway Act may enable a different conclusion to be now arrived at.

Some of the cases referred to were cases arising from passive negligence, which is different from an act of, or an active proceeding constituting, negligence.

He referred generally to the following cases: *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195; *Butterfield v. Forrester*, 11 East. 60; *Truff v. Warman*, 2 C.B.N.S. 749, 750; *Cowley v. The Mayor, &c., of Sunderland*, 6 H. & N. 565; *Bilbee v. The London, &c., Railway Co.*, 18 C. B. N. S. 584; *Walker v. The Midland Railway Co.*, 14 L. T. N. S. 796; *Indermaur v. Dames*, L. R. 1 C. P. 274; *Morrison v. The General Steam Navigation Co.*, 8 Ex. 733; *Williams v. New York Central*, 16 N. Y. Rep. 97; *Button*

v. *Hudson River Railway Co.*, 18 N. Y. Rep. 248; *Steves v. Oswego, &c., Railway Co.*, 18 N. Y. Rep. 426; *Wetes v. Hudson Railway Co.*, 29 N. Y. Rep. 315; *Dascomb v. Buffalo Railway Co.*, 27 Barbour 221; *Ernest v. Hudson*, 24 Howard's Prac. Rep. 97.

Freeman, Q. C., cited *Ellis v. The London, &c., Railway Co.*, 2. H. & N. 424.

With reference to the suit on the plaintiff's own behalf, *Irving*, Q. C., besides what had been already argued, which was in general applicable to this case, as well as to the one brought by him as administrator, stated that there was the special matter applicable only to plaintiff's own personal suit, that the learned Chief Justice did not separate the question of negligence from the assumed duty of the defendants to fence and their omission to fence, although such want of fencing had nothing to do with the proximate cause of damage or injury: the general allegation of negligence in the cause was not tried by itself, as it should have been: *Sills v. Brown*, 9 C. & P. 601.

O'Reilly replied, the two cases having been argued together, on its being understood he should reply if it were necessary to comment on any of the cases that had been cited.

A. WILSON, J.—It is necessary to ascertain correctly the facts of the case before we can safely apply the rules of law which were argued upon and referred to in the numerous decisions that were cited.

There was a pic-nic party on the 2nd of August, 1866, formed of persons residing in or residing chiefly in the City of Hamilton, appointed to be held at the Beach, about five or six miles from Hamilton. The plaintiff, his wife and child, went in the cab, to which the accident afterwards happened. They left Hamilton for the Beach about half-past two o'clock in the afternoon, and by the same road as they afterwards returned. They came back some time past six in the afternoon: it was about half-past six when they came to this crossing.

The excursion railway train, a very large one, consisting of about twenty cars and two engines, was at this time approaching Hamilton from the east, that is, from the Suspension Bridge at the Falls, travelling at the rate of twenty or thirty miles an hour.

The locality of the ground, so far as it is material, may be described as follows:—From the crossing in question there is a public road running northerly and very nearly straight to one Lotteridge's house, a distance of about 290 yards. Opposite Lotteridge's house the road takes a sharp turn. This turn is called Lotteridge's corner. The road then runs in an easterly direction, not parallel to, but gradually approaching, the railway line. About 350 feet east from Lotteridge's corner is situated Lotteridge's barn, abutting on the south side of the road, or the side next the railway. All the space between this road on the north and the railway on the south, east of Lotteridge's, to within about 200 yards of Lotteridge's corner, is the field in which was growing the crop of Indian corn. The ground slopes gently from Lotteridge's corner to the vicinity of the railway: then it rises to and at the crossing.

Captain Nicholls said: "The cab I and the plaintiff and his wife were in was open at the sides: there was no obstruction to the sight by the cab. I had never thought of the railway at all. If I had been looking in that direction the train would have been visible for 500 yards. The land is cleared down for half a mile at least. The track is elevated above the land on each side, in the direction we would look. If the driver had looked down the road he could see a long way: it is pretty straight. When I saw the train the horses heads were within five or six feet of the rail: the train was then about 130 yards distant from the crossing. I was the first who saw it, and called out to stop. Mr. Law called out to lay on the whip. There is no doubt we would have been saved if the cabman had been looking out for the train, as he would not wilfully run into danger. There is a cow shed opposite the keeper's house, which would obstruct the sight some small distance."

Robert M. Law, who sat outside on the driver's seat with him, said: "I first saw the train about a second before it struck us: my back was towards it. I saw the cabman looking towards the train and change his countenance. I turned to him and cried to put on the whip, which he did. I had a thought about the railway as we came along. I had a command of the view to the west. I did not look to the east at all. I should judge, when the countenance of the cabman first changed, we were seventy or eighty feet from the engine, and that was the first I think we saw of it. If I had been looking that way I would have seen the train in time to have prevented collision. I think the corn would not have obstructed my view, if I had been looking that way. The cabman only looked out for the train as far as I saw, at seventy or eighty feet from the track. I can't answer the question, "Whether, if I had been looking out, the accident would have occurred." At the moment I saw the train it would have been impossible to stop the train or cab."

Arthur Kline said: "When I first saw the train my horses' feet were on the track. I first heard a voice inside the cab say, 'Stop.' Mr. Law said to put on the whip, and I did so. I looked both ways twenty yards before we got to the shanty, and I saw no train. I could see three-fourths of a mile east. I looked within forty yards of the track and saw nothing. There are three or four barns that obstruct the view, built crossways."

This is the evidence of three out of the four grown persons (survivors), who were in the cab when the accident happened, the fourth being this plaintiff himself. It is a very reasonable inference to draw from their account of the transaction—1st. That they were not looking out for the train at all, although they all knew they were approaching the railway crossing where there were neither gates nor fences; 2ndly—If they had been looking out in the direction of the barn, that they would have seen the train for 500 yards before it came to the crossing, as it is all cleared down for half a mile at least, and the track is elevated

above the land on each side in that direction ; 3rdly—That the corn was no obstruction to the sight ; that the cow shed, at the most, obstructed the sight only a small distance, and that there is nothing to warrant one in believing the barn obstructed the view, for the cabman who states this, says he could see three-fourths of a mile east ; and 4thly—That, as Captain Nicholls says, there is no doubt they would have been saved, if the cabman had been looking out for the train.

I have said nothing as to whether the engineer sounded the whistle or not, because the fact of this having been done is denied by the plaintiff's witnesses, none of them having heard it till the moment of collision, although the defendants' witnesses nearly all heard it. Clearly this is a disputed matter.

The facts stated by the parties who were in the cab are stated also by others.

Charles DePew, one of the plaintiff's witnesses, says, "I think in coming from Lotteridge's you could see the train easterly until you come to the shed. When on the flat, this side of Lotteridge's [*i. e.*, between Lotteridge's and the crossing], you could not see the train so well for the corn field : the corn field is 300 or 400 yards from the crossing. [It is not so much : it is not more than 250 yards.] No difficulty in looking out for the train."

Mary Farmer said, "I saw the cars before we came to Lotteridge's barn. I would not have observed the cars if my husband had not directed my attention to them. If I had been looking at the cars it would have been impossible for me or any one else to have been run down."

Upon this case for the plaintiff, the Chief Justice gave leave to the defendants to move to enter a nonsuit, if the jury found the plaintiff's driver was guilty of negligence, and substantially contributed to the accident by such negligence, in case the Court should think, in relation to the duties imposed on the defendants by the Statutes, such finding was a defence to the action.

For the defendants, Wm. Lotteridge heard the whistle

blow 300 or 400 yards before the train came to the crossing. So did Wm. DePew, Jacob Turner, Benjamin C. Moore and Benjamin Moore, at about the same distance.

Henry Smith says he heard it 500 yards before it got to the crossing.

Alexander Wray, and Bryan McIlroy, also heard it long before it came to the crossing.

Thomas Moorhead, the engineer, says he whistled at about 400 yards east of the crossing.

The weight of evidence upon this point is in favour of the defendants.

On some of the other points the witnesses for the defence speak strongly for the defendants; for instance, Henry Smith said, "If any of the parties in the cab had looked, it was impossible not to have seen the train anywhere on the road from Lotteridge's corner to the crossing. The shed there is not more than eight or ten feet high. If I had been on a cab I could have seen the track over it. I could not see the track all the way for the cornfield; but we could see the train and locomotive."

Bryan McIlroy said, "Any man, driving from Lotteridge's to the crossing, with half-an-eye, could have seen the train if he was looking out for it."

The first question is, does the want of fencing by the defendants at this crossing of the highway constitute such negligence *per se* that the plaintiff must recover against them, however culpable he may have been, and although such want of fencing was not the cause or occasion of the injury complained of? If it do, the verdict must stand for the plaintiff as rendered. If it do not, then arises the second question—Did the want of fencing lead to, or was it the cause of the damage which happened to the plaintiff? If it were, the verdict should stand; if it were not, a non-suit should be entered, unless there still be sufficient evidence of carelessness against the defendants to hold them responsible for the accident; in which case the third question will be—Is there sufficient negligence proved against the defendants to sustain this verdict?

I assume for the purposes of this action that the 150th section of the General Railway Act does not in any way modify the liabilities or duties of the defendants, under their special acts, to fence where and in the manner these acts require they should fence.

As to the first question, I think the want of a fence at the place in question does not *per se* constitute such negligence in the Company to entitle the plaintiff to recover, however culpable he may have been.

The omission to fence is and was negligence on the part of defendants to perform their statutory duty; but such neglect on their part will not give a cause of action to a person who has been contributory to his own injury by negligence on his part, not connected with, and not dependent in any way upon, the want of fencing.

To justify a recovery against the defendants for omission to fence, it must appear that the damage which happened to the plaintiff resulted to him from the want of fences as the proximate, if not the direct cause, of the accident.

The plaintiff, being a rational agent, must determine when and under what circumstances he will cross the railway at this point. He must judge and act reasonably. He must not blindly or wilfully drive upon it, whether there is danger to be apprehended from his doing so or not. If he wilfully go upon the track, when danger is imminent and obvious, and, it may be, even against remonstrance, and sustain damage, he must bear the consequence of his own rashness and folly: he cannot call upon the defendants to compensate him for his injury, if he survive; nor can his representatives call upon the Company to make compensation to them if he be killed.

There have been many cases for the killing of animals, in which the same rule could not be applied, and the owners were held entitled to recover, although the cattle were not rightfully on the highway; for if the Company did not fence, the cattle were rightfully on the highway, as against the Company: *Fawcett v. The York Railway Co.*, 16 Q. B. 610.

As the plaintiff cannot recover if he obstinately rush into danger and suffer an injury, so neither can he recover if he sustain the injury through very gross disregard of the ordinary rules of human prudence.

There must be some degree of neglect, short of mere wilful and obstinate persistence in a dangerous venture, which will preclude a recovery; something approaching to a determination to run the risk at all hazards, which shewed by evidence that the person assumed the consequences of his own conduct, and that he did not mean to look to any one for redress or compensation in the event of his failure.

In such a case the party must be altogether a wrong doer, having no more business there at such a time than the cattle had to be on the line, in *Sharrod v. The London, &c. Railway Co.*, (4 Exch. 586), and his conduct would be almost as perverse as in *Caswell v. Worth* (5 E. & B. 849).

As to the second question, the consideration of which helps very much to determine the first one, we must consider what the plaintiff's claim is, as he has stated it on the record. It is, "that by and through the mere carelessness and negligence of the defendants and for want of sufficient fences, &c., &c., the locomotive and train of the defendants were driven with great violence against a carriage, in which the wife of the plaintiff was then lawfully travelling along the highway, where it is intersected by the railway, whereby the wife of the plaintiff was thrown upon the ground with great violence, and was so injured that by reason thereof she died." Was this wrong, then, committed "by and through the carelessness and negligence of the defendants, and for want of fences, &c.?"

From this statement it follows that it may be shewn by the defendants that the wrong did not happen by and through their mere carelessness and negligence, and for want of fences, &c., and if it be so shewn, then it is clear that the supposed cause of action has been fully answered. The most common mode by which this is done is by shewing that it was by and through the mere carelessness and

negligence of the plaintiff himself that the injury was done ; or, that he was so far a party to the immediate or proximate cause of it, that if it had not been for his own negligence and want of due and ordinary care and caution, the misfortune would not have happened.

This is the rule which was laid down plainly in *Butterfield v. Forrester* (11 East, 60), and was approved of in many cases, until it was finally adopted by the Exchequer Chamber in *Tuff v. Warman* (5 C. B. N. S. 573) ; and it is the rule which has since been substantially followed in all subsequent cases. See *The London and South-Western Railway Co. v. Walton* (14 L. T. N. S. 253 ; *James v. The Great Western Railway Co.* (C. P. Weekly Notes, 16 February, 1867, fo. 55).

The direction given by Chief Justice Erle, to the jury in *Indemaure v. Dames* (L. R. 1 C. P. 274, affirmed in Exch. Ch. Weekly Notes, 16 Feb, 1867, fo. 57), is shortly put in this way : " If there was no negligence on the part of the defendant, or if there was want of reasonable care on the part of the defendant, but there was also want of reasonable care on the part of the plaintiff, which materially contributed to the accident, the plaintiff was not entitled to recover ; but if there was want of reasonable care on the part of defendant, and no want of reasonable care on the part of the plaintiff, the plaintiff was entitled to a verdict."

This want of reasonable care on the part of the plaintiff, which materially contributed to the accident, depends upon and may be established by a great variety of circumstances.

In such an enquiry it is assumed there was negligence on the part of the defendant which led to the accident, and the question is whether the plaintiff was not also a party and contributory by his negligence to that accident.

The circumstances relied on by these defendants to shew negligence sufficient to disentitle the plaintiff from recovering against them are :

1. That the cab-driver, (and those he was then driving can be in no better position than he is as to their rights in such a case), well knew this particular locality, and that

the railway was not fenced off from the highway: he had driven over it just a few hours before with the plaintiff and his wife, who was afterwards killed.

2. That he kept no lookout for trains approaching the crossing, and did not see the train which ran against the carriage "until the horses' feet were on the railway track," although the train could have been seen for at least three hundred yards before he got to the crossing, the distance of at least five hundred yards before it came to the crossing. Now, the knowledge of the cab driver, that the highway was not at this place protected by a crossing, is a material circumstance to be considered by the jury. In *Walker v. The Midland Railway Co.* (14 L. T. N. S. 796) a passenger got out of a railway train at a station and walked along the way which she was well acquainted with, and proceeded to cross the line by the appointed level crossing. At the moment she stepped on the line, a train, which she could have seen if she had looked, arrived at the same spot and she was knocked down and killed. It was held there was no evidence of negligence against the Company to be left to the jury; it not being negligence, that they had not a person stationed on the spot to warn passengers about to cross the line of the approach of a train, of which, if passengers used due care, they might inform themselves.

In *Crafter v. The Metropolitan Railway Co.* (L. R. 1, C. P. 300) the Court decided the plaintiff could not recover for an injury he had suffered from slipping on a staircase nosed with brass, and not furnished with hand rails; that the want of a rail and the facing with brass, instead of with lead, gave no cause of action; and it was added, "the plaintiff was shewn to have been in the habit of using the staircase for about eighteen months, and many thousands of persons have used it without any accident having happened." Then, as to the necessity of the driver maintaining a lookout, it is quite manifest this was his duty: he cannot go on at all hazards, because the other party is in fault. If this were so, it would have been right of the plaintiff to have killed the donkey, in *Davies v. Mann*; and it would

be right in the plaintiff to run over a drunken man lying on the highway, or to run against another who was driving on the wrongside of the road; and the numberless other cases, which have laid down the rule that contributing to the accident is a deprivation of the right of action, must all have been wrongly decided.

According to this doctrine, the plaintiff in *Senior v. Ward* (1 El. & El. 385), where the defendant was guilty of "the most culpable neglect," should have recovered, although the deceased was told that very morning not to go down into the mine without first testing the rope, as it had been injured the night before, but yet went down against such advice and direction, and was killed; and the plaintiff also should have recovered in *Caswell v. Worth* (5 E. & B. 849), where, although the defendant was guilty in not fencing off his machinery according to the Statute, the plaintiff wilfully and against the command of the defendant, set the machinery in motion and injured himself.

But the law is more reasonable; for while it punishes those who wrongly disregard their duties, it does not provide for those who will take no trouble to protect themselves.

A nonsuit was directed to be entered in the case of *Stubley v. The London &c., Railway Company* (L. R. 1 Exch. 13), because, as was said by Pollock, C. B., "The railway runs in a straight line for hundreds of yards on either side of the place to which the deceased must come before crossing the line: it is in itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming."

Bramwell, B.: "Need there be any one to warn persons of a train, which they can see so far off that, if they only take the trouble to look out for it, it cannot overtake them in crossing?"

After a careful consideration of all the facts, I have come to the conclusion that there is no evidence whatever that the want of fencing led to, or was the cause of, the misfortune which happened to the plaintiff.

Then, thirdly, Was there sufficient evidence on the whole case, of negligence on the part of the defendants, to sustain this verdict? In my opinion there was not. The want of fencing is charged as the principal cause of the injury, but, as I have stated, it was not I think the proximate cause of it. The want of a fence may have exposed the persons in the cab to injury, but it did not occasion the injury; just as Coleridge, J., said in *Clayards v. Dethick* (12 Q. B. 445), "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, drunkenness would have made the man liable to injury, but *would not have occasioned the injury.*"

Nor do I think that the fact of this having been an excursion and unusual train, not mentioned in the time tables of the Company, made any kind of difference. The same ground was referred to in *Stubley v. The London &c., Railway Company*, where Bramwell, B., said: "Mr. Manisty says that if a watchman were at the point, the watchman would know the times when trains are to pass; but are there to be no special trains? No engines traveling backward and forward at uncertain times, for the purposes of traffic, which would not be expected, and of which he could give no warning?"

The conclusion to which I have come is the same conclusion to which Captain Nicholls himself came and stated so directly in his evidence: "There is no doubt we would have been saved if the cabman had been looking out for the train, as he would not wilfully have run into danger;" and that the cabman was not looking out is manifest from his own evidence, that he never saw the train until his horses' feet were on the track, although it could have been seen for a very considerable distance before either the cab or the train approached the point of intersection. Taking the most favorable view for the plaintiff as to all manner of alleged obstructions; the barn, the cornfield, and the shed, that were spoken of; there having been still a distance of forty feet after passing the shed before reaching the rail, the cabman, driving at a dog trot, or very little faster, up a rise of

ground to the track, had plenty of time and opportunity to have seen the train, if he had been looking for it, and to have stopped his horses before he got to the track, and so have avoided the accident.

In the case of *Winckler*, administrator, the rule should in my opinion be made absolute to enter a nonsuit.

In the individual suit of this plaintiff, I think, the question of contributory negligence on the part of the plaintiff should not have been combined with the charge of neglect by the defendants to fence, because the evidence shewed the want of fencing was not the creation of, nor proximate cause of the accident. But if the want of fencing could be considered as constituting negligence on the part of the defendants, then, I think, the jury should have been told that, assuming the defendants to have been guilty of neglect in not fencing, they must determine whether the plaintiff did or did not so far contribute to the misfortune by his own negligence or want of ordinary care and caution; that but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. And this the Chief Justice did plainly tell them, but afterwards, at the request of the plaintiff's counsel, who did not wish the jury to be asked whether the plaintiff did substantially contribute to the accident, the Chief Justice stated that, as he took the same view as the plaintiff's counsel, he did not charge the jury to find specially on the question of negligence generally, as applicable to the present state of the road; to which the defendants' counsel objected; and from this, as I understand it, and as, perhaps, the jury also understood it, the question of community of default was practically withdrawn from them, and they were led to believe that because the defendants were in default, the plaintiff must recover though the want of fencing did not occasion or contribute to the accident; and this view of the case I have already adverted to, and, according to the best opinion which I can form, think to be erroneous.

If there had not been this objection to the charge, I should

have been in favor of granting a new trial, because, in my opinion, no case was made out to go to the jury, and the plaintiff should either have been nonsuited, or a verdict should have been given for the defendants.

Captain Nicholls was recalled, in this case, for the purpose of explaining that when he had in the previous case said, "There is no doubt we would have been saved if the cabman had been looking out for the train," he meant to have said, and he did say in this case, *vigilantly* looking out.

I do not think this addition alters the sense or effect of the sentence. There are degrees in looking out, as there are degrees of negligence; but negligence is not the less negligence, because it is not gross negligence, and not looking out is not the less a failure or default, although it was not a vigilant look out. These expressions are often very loosely applied, and are apt to mislead: they do not always or necessarily qualify neglect; and in this particular case the expression has no force whatever, for the driver was not looking out at all, and, so far as I can understand, none of the other numerous persons, who saw the train, were vigilantly looking out, or doing more than simply looking out; but so little was this cabman on the alert, that those inside the cab saw the train approaching before he did, though sitting on the outside and sitting higher, and although it was his especial duty to maintain a constant and vigilant observation. I think in this last case the rule should be made absolute for a new trial without costs.

J. WILSON, J.—It has been held that these defendants are bound to fence the railway grounds, including the public highways which cross them. I defer to that judgment, but I have never been able to satisfy myself that the Legislature meant that fences and gates should be put across these highways, which, so far as my judgment extends, would make them much more dangerous to the public than they are when left open.

But the defendants are bound to fence the highway, and are guilty of negligence if they leave them open. The

negligence charged here, as the cause of the accident, was, that there was no fence. Suppose there had been gates on both sides of the road, and the plaintiff had entered one to cross the track and go out at the other, was he relieved from the duty of looking around to see whether the train was coming in either direction before he crossed the rails? There were no gates. Did this relieve him from the duty of looking around, which was cast upon him, if the gates had been there? The evidence is that the horses' feet were on the rails before the driver saw the locomotive, and it was then almost upon him. If he had looked there was nothing to have hindered him from seeing it for at least five hundred yards from the approach to the crossing.

The defendants have a right to run their trains, and they can neither go to the right nor left, nor can they stop them at once. Knowing all this, the Legislature gave the defendants the right to run their trains, and, I think, cast the duty upon those who cross their track not to rush in the way of their trains, when in motion, which they cannot control. Is it open for this plaintiff to say, you did not fence your road, and I have therefore a right to run in front of your train, and if you injure me or my property, you shall answer for it in damages? Fence or no fence, gate or no gate, I think, every one is bound to exercise reasonable care in crossing a railway, so that he does not put himself in the way of being run over. In this case there was a want of that reasonable care, by which the plaintiff by his own negligence contributed to the injury, and he has no right to recover against the defendants for a negligence of theirs not contributing to the injury.

With great respect for the opinion of the learned Chief Justice, I have been unable to adopt his ruling as law, and I concur in the judgment of my brother Wilson. I refer to *Stubley v. L. & N. W. R. Co.* (L. R. 1 Ex. 13); *Bilbee v. L. & B. R. Co.* (18 C. B. N. S. 584.)

RICHARDS, C. J.—I am not prepared to say that the opinion formed by my learned brothers is not sustained by

the weight of authority. It must in most cases, nevertheless, be left to the jury to say what was the real cause of the accident. The doctrine of contributory negligence no doubt is still presented to the jury; but it seems to me that when it is admitted that a *prima facie* case of neglect to observe statutory provisions is made out against a Company, the jury may properly be told to look at all the circumstances; the statutory obligations of the Company; their open and known neglect of them; the frequency of the passing of trains across the highways; the usual speed of the locomotives; the formation of the track; the time of the day; and then say what was the *causa causans* of the accident; was it the negligence of the driver of the vehicle, or of the Company in not taking the precautions directed and required by the Statute? If a Railway Company will persistently refuse to perform the obligations cast upon them by their charter, in matters affecting the safety of the public, as well as of their own passengers, I think Courts should be slow to grant new trials in their favor, in cases where no misdirection can be shewn, when the verdicts are for a reasonable amount, and there is nothing to shew that the jury were influenced by improper motives in giving their verdict.

The language of the late Sir J. B. Robinson, in *Tyson v. G. T. Railway*, (20, U. C. R., 256) may be applied to the case before us. He says: "When there is a neglect to give the proper signals, and an accident happens at the crossing, we do not think the Company can be exonerated from liability by shewing that the man who suffers by the accident did not manage so well as he might have done under the circumstances, or that his horse was restive or unsteady. All people have not equal judgment, nor equal presence of mind, nor equal experience in such matters. If those signals, which the law requires, are given, then the Company will in general be safe from liability, and people must keep out of the way at their peril; but when that precaution, which should never be neglected, and can always be easily observed, is omitted, the train may come unexpectedly

upon the person travelling along the road, and its approach may not happen to be observed from various causes, and he has not the chance, in consequence, which the law intends he shall have, of considering what he has to do, or he has not time to do it. It is not to be expected that none but steady and well trained horses and skilful drivers will be using the road, and it does not lie in the mouth of a Railway Company to say, 'If we did not give the proper signal to announce our approach, still it would not have signified if you had been quick and sharp, and had kept a good look out, and had made no mistake in your hurry, and if your horse had been steady and manageable, and had had sense enough not to be frightened.'"

If, on the occasion referred to in this case, the locomotive had been thrown off the track and a number of the passengers killed, in an action brought against the Company; could they say that the injury was not caused by their negligence, but by the negligence of the driver of the vehicle, and therefore that they were not liable, although they had themselves deliberately omitted to take the precaution in relation to fencing their road, which the law had imposed upon them, with a view to the safety of their passengers and the public, and which would have prevented the accident? They certainly would have been guilty of negligence, whilst their passengers were not, and as between them it seems to me the Company would be held responsible.

Then, as to the safety of the public using the highway. It is true all persons passing and repassing may be supposed to know that the railway Company had not fenced their line, and that the highway may be crossed at any moment by this dangerous machine. The observations quoted from the case in 20 U. C. R. seem to me to apply, when the means which the Legislature provided that this Company should use, viz. fencing along the line of the railway, to prevent accidents, have been omitted. I do not say that no case can arise in which the driver of a vehicle may not be guilty of negligence, and that the accident may not have arisen from such negligence and not from the omissions of the

defendants; but the evidence in such cases ought to be clear and conclusive, and in general the opinion of the jury would be required to be taken on it.

The mere fact of the driver of a carriage knowing the railway had not fenced their line, where it crosses the highway at the place of the accident, does not necessarily imply that he was guilty of negligence in what he did. We all know that familiarity with danger and the frequency of the occurrence of events likely to cause injury often have the effect of making people less observant of those very events. The novelty of the passing of trains wears off; the individual is absorbed in matters of thought; or being of a sluggish temperament, does not observe as closely as he in different circumstances might, or as a different person might. The noise of the approaching train is not heard, because there may be a strong wind blowing towards the direction in which the train is approaching, and when it is seen or heard he does not exercise the presence of mind which a calm person might. Under such circumstances it is contended that if the persons riding in the carriage are injured, the Railway Company is to be considered exempt from blame, and the question whether, under the circumstances, the accident was caused by the negligence of the driver or of the Company is to be considered on the bald proposition as what the driver ought to have done, and not what the Railway Company has deliberately determined not to do.

It seems to me that the whole question of negligence ought to be submitted to the jury, with the charge directing them to consider all the circumstances of the case in the way I have intimated above, and unless the finding of the jury be clearly wrong and unjust, it ought not to be disturbed. Owing to the gentlemen who conducted some of the cases tried after the case of *Winckler*, Administrator, and before that of *Winkler* in his own right, against the defendants' Company, taking a different view as to the way in which the matter should be left to the jury, there is some confusion in my notes as to how the latter case was placed before the jury.

What I endeavoured to impress on the jury was, that it was the statutory duty of the defendants to fence along the railway; that they having neglected that duty, and the driver of the plaintiff's carriage being aware of that fact, and that the railway crossed the highway where it did, the jury were to take all the facts into consideration and say if the real cause of the accident was the neglect of the driver of the vehicle the plaintiff was in or not; and if caused by such neglect, then find for the defendants; if not, find for the plaintiff.

I illustrated the subject by supposing the case of a bridge out of repair, and notice given not to cross it because it was dangerous, and a person having notice of the fact, nevertheless, thinking he might save a mile or two of travel, rashly determined to go over, and the bridge fell, killing his horse; under such circumstances the cause of the accident was the want of care of the person crossing.

So in most, if not all, of the cases of what are called contributory negligence, the true point may be reached by inquiring what was the real cause of the accident. There may be some kinds of negligence that would not properly be considered as having anything to do with the accident; such as the case of the two steamers coming into collision by the clear negligence of one, and a passenger being struck and injured by an anchor which had not been properly swung; in such a case the accident was caused by the negligence of the steamer, not by the improper slinging of the anchor.

I am not prepared to say, if I had been on the jury, I would not have found for the defendant. I probably should have done so. But, inasmuch as I consider that there was no misdirection, and the defendants have for years disregarded their statutory obligation to fence along the railway, and apparently are determined to do so, I do not think I should grant a new trial, at all events, on the ground on which it is argued before us.

In the case of Winckler, Administrator, I think the non-

suit should be entered; but in Winckler on his own behalf I think the verdict should stand.

Rule absolute to enter nonsuit; and rule absolute for new trial, without costs. (a).

FLINTOFT V. ELMORE.

Sale of goods by Sheriff—Statute of Frauds—Memorandum in writing—Delivery.

A sale of goods by a Sheriff or his bailiff under execution is within the 17th section of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing in the same manner as an auctioneer or his clerk.

The entry of defendant's agent as the purchaser is sufficient, if the defendant afterwards acknowledge the agent's authority, as was done in this case.

In this case a person, requested by the bailiff to act as his clerk, noted in pencil on the back of a letter the name of each purchaser, the article sold, and the amount bid; and after the sale was over, but on the same day, the bailiff made out a more extended memorandum, headed "List of goods sold and by whom bought, 17th October, 1866," and containing the article, the purchaser's name and the price. This he signed "D. Howard, Bailiff: "

Held, insufficient, for it did not appear who the seller was, or the terms of sale, and the second memorandum could not bind, for the bailiff's authority continued only during the sale.

Defendant after the sale wrote to the Deputy Sheriff speaking of the engine, one of the articles claimed for, as being on his lot, which belonged to him, and having been bid in for him by Mr. T. (the agent who had purchased at the sale), and saying that he had heard the Sheriff's fees had not been paid and that he intended to sell again:

Held, insufficient, for it did not shew the terms of sale, and it was not evidence of a delivery to satisfy the Statute, which the other evidence tended strongly to disprove.

ASSUMPSIT for money payable by defendant to plaintiff for goods bargained and sold, goods sold and delivered, and on the account stated.

Plea. Never indebted.

(a) Leave to appeal granted.

The cause was tried at Sarnia, before Morrison, J.

The evidence at the trial shewed that certain persons known as a firm, composed of one Spencer and others, were purchasers of land from the defendant, probably bought for the purpose of sinking an oil well on it : that on the piece of land so purchased there were a steam-engine, plunging-rods, walking-beam, belting, oil-tank, tubing, and other articles connected with that kind of work : that on the 16th October, 1866, there was an execution in the hands of the Sheriff of the County of Lambton against Spencer *et al.* in favor of the plaintiff, and one against Spencer in favor of one Gilbert. The property, being on the piece of land already mentioned, was put up for sale on the 17th October, by a bailiff of the Sheriff at the Sherman House, about a mile distant from where the property was. Robert Todd became the purchaser of the engine, a tank and a stove, for the defendant, for \$663. At this time Spencer *et al.* after having been nearly a year in possession of the land purchased by them (though never conveyed to them), had gone to the United States. They had not been formally dispossessed, and two of defendant's witnesses said though they had left, the possession had never been interfered with. One of plaintiff's witnesses stated that before the sale he saw some of defendant's men working at the place. He had not seen defendant in possession since that. Defendant in fact resided in the United States.

As the goods were sold Mr. Watt was asked by the bailiff to act as his clerk, and he did so, noting in pencil on the back of the letter from the Deputy Sheriff to the bailiff, enclosing the writ to him, the name of the purchaser and the amount bid. The first memorandum was as follows : "Engine, Robert Todd, \$640." The next, "Frame walking-beam and belting, \$110, Stratford Petroleum Co." Then other entries to other purchasers. "Cooking-stove, \$3, Todd ; Oil-tank, \$20, Todd."

Afterwards, during the same day, the bailiff made out a more extended memorandum headed, "List of goods sold, and by whom bought—17th October, 1866.

1 Steam-engine, Robert Todd.....	\$640 00
Frame Walking-beam and Belting, Jarvis & Wall	110 00
450 feet Plunging-rod, 3 cts. per foot, (paid), Peter Taylor	13 50
500 feet of 3½ inch Belting at 30 cts. per foot, Jarvis & Wall.....	150 00
1 Cooking-stove, R. Todd	3 00
1 Oil-tank, R. Todd.....	20 00

(Signed), D. HOWARD, *Bailiff*.

The bailiff could not say Todd was present, when he made the memorandum. It was made as soon as the sale was closed.

Mr. Watt, on behalf of Gilbert, claimed, as his execution was first in the Sheriff's hands, that he should have priority over defendant's execution, and have the whole of the proceeds, and he so claimed before the sale. The sale however went on.

After the sale was over the attorneys, on behalf of Gilbert and Elmore, had agreed that the defendant should pay Gilbert \$200 and a Division Court execution, making together \$270. Griffith then, as attorney for defendant, gave the bailiff an order to apply on the execution in defendant's favor the \$663, the amount of Todd's purchases at the Sheriff's sale. The bailiff said he wanted the Sheriff's fees, if that was to be done. Griffith and Todd refused to pay the amount of the goods sold. They both said they wished to credit it on defendant's *fi. fa.* The bailiff said he would carry the order and give it to the Sheriff. This conversation with Todd and Griffith took place after the sale.

The Deputy Sheriff stated the execution in favor of Gilbert was received on the 11th August, 1866, and was against Spencer alone; that the property was sold under both writs. The Deputy Sheriff further said he would not have allowed the order to apply on the execution of the defendant, in consequence of the dispute as to who had the right to the proceeds of the sale.

The arrangement proposed for settling the matter not having been carried out, on 26th October a memorandum, as follows, was signed by the attorneys of Gilbert and Elmore :

Gilbert v. Spencer. } We consent that the Sheriff of this
Elmore v. Spencer. } County may delay applying for an
interpleader order to await the result of negotiations now pending for a settlement, and till notified to the contrary by either of us ; and we further consent, in case the Sheriff find it necessary to interplead, that an order may be made at once by any Judge having jurisdiction, requiring the plaintiffs in each of these cases to try their respective rights to the proceeds of the sale by interpleader in the usual way. Dated 26th October, A. D. 1866.

(Signed) JAMES WATT.

A. J. GRIFFITH.

The matter remained in this state for some time, the Sheriff at times pressing for his fees.

In April, 1867, the defendant wrote to the Deputy Sheriff that Mr. Griffith about once in every three months informed him that the engine on his lot, which belonged to him, and was bid in by Mr. Todd for him, was likely to be sold, and the last he heard from him was that the Sheriff's fees had not been paid, and the latter intended to sell again. He asked what was the amount of the fees, and why Mr. Watt did not pay in the money for the walking-beam, tubing, &c., which he bid in at the sale. He concluded : " This poor engine stands there to be seized by everybody that gets a judgment in Canada. I have no idea in what shape it now stands, but hope to clear it up before long."

Mr. Griffith said that in pursuance of the arrangement between Mr. Todd and himself he gave a receipt to the bailiff to apply on defendant's execution for the goods bid off by Todd. The bailiff received the receipt and appeared satisfied, and only asked for his fees, and Mr. Todd said he would call at the Sheriff's office and pay them. The arrangement with Todd was to bid off and settle the matter in that way, and

the receipt was accepted in that way by the bailiff. He did not know who was in possession of the land where the engine was.

At the close of the case the defendant's counsel moved for a nonsuit. The grounds taken at the end of the plaintiff's case were that there was no actual delivery of the goods; nothing shewn to take it out of the Statute of Frauds as for goods bargained and sold; no contract within the Statute, the memorandum of the Sheriff's bailiff not being sufficient; and that the bailiff had no sufficient authority to sign a memorandum to bind both parties.

The learned Judge said he would ask the jury whether the defendant took possession of the engine, &c., under the sale by the bailiff, and if they found he did, he would give the defendant leave to move to enter a nonsuit.

He left the case on that point to the jury, calling their attention to the letter of the defendant. He also told them that if the purchase by Todd for the defendant was upon the understanding that the amount of the purchase money was to be settled for by being credited on defendant's *fi. fa.*, to find for defendant.

The counsel for defendant objected that the letter of defendant was no evidence of an acceptance; and receipt within the Statute of Frauds, and there was no evidence of such: that before the Statute was satisfied there must be a delivery by the vendor with the intention of vesting the property in the vendee.

The jury found for the plaintiff damages \$663, and said the letter satisfied them the defendant took possession of the engine.

In Michaelmas Term last, *C. Robinson*, Q. C., obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved at the trial, on the grounds

1. That there was no memorandum in writing, and no acceptance and receipt to satisfy the Statute of Frauds.

2. That the Sheriff, on the evidence given, was not entitled to sue for the price of the goods sold by him; or for a

new trial, for misdirection of the learned Judge in telling the jury to find whether the defendant had taken possession of the goods, and that if so, the Statute of Frauds would be complied with, and refusing to ask them whether there was an acceptance and actual receipt of such goods, or any part thereof, and refusing also to tell them that there could be no sufficient acceptance and actual receipt unless the vendor's lien was parted with, which the evidence disproved; or on the ground that the verdict was contrary to law and evidence, and the weight of evidence, the evidence shewing that there was no sale for cash to the defendant, and no sale legally proved.

During the term *John Patterson* shewed cause:—

The memorandum made by the person who acted as clerk to the bailiff is sufficient: the name of the purchaser and the prices were put down, which, under the decided cases in reference to an auctioneer, is sufficient: *Kenworthy v. Schofield*, 2 B. & C. 945; *White v. Proctor*, 4 Taunton 409; *Emmerson v. Heelis*, 2 Taunton, 38. *Ess v. Truscott*, 2 M. & W. 385, shews that the act of the clerk not objected to at the time is as binding as that of the bailiff in making the memorandum. Before any objection as to the conditions of sale being omitted in the memorandum can be taken it must be shewn there were conditions: *Vandenberg v. Spooner*, L. R. 1 Ex. 316. The subsequent recognition of the authority of the agent is sufficient: *Roscoe on Evidence*, 11th ed. 150, 1, 2. The evidence as to possession may be evidence of constructive acceptance and delivery: *Bush v. Wheeler*, 15 Q. B. 442; *Edans v. Dudfield*, 1 Q. B. 302; *Lillywhite v. Devereux*, 15 M. & W. 285; *Maberley v. Sheppard*, 10 Bing. 99; *Baldey v. Parker*, 2 B. & C. 37. The subsequent recognition of Todd's authority is sufficient: *McLean v. Dunn*, 4 Bing. 722. The right of the clerk to sign the name of the purchaser is a matter of fact, and the evidence of the bailiff and of Watt in connection with defendant's title is conclusive.

That the sale could not have been as contended for by defendant, namely, applying the amount on his execution,

is evident from the admitted fact that the parties contemplated an interpleader, and the memorandum signed by the attorneys for both parties several days after the sale shews that both parties then considered the sale as a valid one.

Robinson, Q. C., contra :—

Jarvis v. Cayley, 11 U. C. 282; *Ruttan v. Weller*, 14 U. C. 45; *Dickson v. Allan*, C. P., not reported; *Kingsmill v. The Bank of Upper Canada*, 13 C. P. 600; are cases in which Sheriffs have maintained actions similar in principle to this, and it is not now contended that such an action will not lie.

Todd, the defendant's agent, was only authorized to bid if his bid were applied on Elmore's execution, and therefore in that view defendant is not liable. The engine was on a lot a mile from the place of sale, and was never delivered to or accepted by defendant or any one for him. There was no valid contract under the Statute of Frauds. The Sheriff or his bailiff is not an auctioneer, and therefore could not, as the agent of the defendant, bind him, nor could Todd, as defendant's agent, delegate an authority to the bailiff or his clerk to bind defendant.

In addition to the cases from Taunton cited, see *Story* on Sales, 467; *Bird v. Boulter*, 4 B. & Ad. 443.

The question of whether the auctioneer is the agent of both parties depends on circumstances. *Bartlett v. Purnell*, 4 A. & E. 792, is authority to shew that on a special bargain between the owner of the goods and the purchaser, the latter was not bound by the conditions of sale.

One of the memoranda was only made up after the sale was over. That cannot bind, for the authority of the auctioneer only continues whilst the sale is going on: *Mews v. Carr*, 1 H. & N. 484; *Hilliard* on Sales, 482; *Gill v. Bignell*, 2 Cushing, 358.

The memorandum is not sufficient, as it does not shew the terms on which the sale was made, nor by whom. To meet the demands of the Statute it ought to shew all on its face: 1 *William Blackstone*, 601; *Addison* on Contracts, 53.

There must be an acceptance and delivery ; and all the authorities shew the delivery must be such as to destroy the seller's lien for the purchase money. The letter shews the Sheriff was holding the engine for his fees : *Robinson v. Gordon*, 23 U. C. 147 ; *Cusack v. Robinson*, 1 B. & S. 299 ; *Addison on Contracts*, 174.

The subsequent letter of defendants is not sufficient to confirm the sale, because it does not shew the terms on which it was made ; *Cooper v. Smith*, 15 East, 103 ; *Phillimore v. Barry*, 1 Campbell, 513 ; *Smith v. Surman*, 9 B. & C. 561. As to constructive acceptance, see *Taylor on Evidence*, 894, 898.

A mere delivery is not the same as an acceptance : under the Statute, to make it effectual the lien must at all events be parted with : *Bill v. Bament*, 9 M. & W. 36 ; *Kershaw v. Ogden*, 3 H. & C. 717.

RICHARDS, C. J., delivered the judgment of the Court.

The first question to be considered is, does a sale by a Sheriff's bailiff, or the Sheriff himself, come within the 17th section of the Statute of Frauds. If a sale by an auctioneer comes within the section, I do not see any good reason for holding the sale by the Sheriff should not : the reason for the Statute applying would hold good as much in one case as the other. If the Sheriff is allowed to sue for the price of goods sold by him, he and his bailiffs have as much interest in a sale as an auctioneer has when he sells and has to sue for the goods sold in his own name. I see no good reason for creating a distinction between the two kinds of sale.

Assuming then that a sale by a Sheriff's bailiff comes within the 17th section of the Statute of Frauds, was there a written memorandum, as required by the Statute, of the sale of the engine and other articles said to have been purchased by Todd for the defendant, made and signed by the party to be charged, or his agent thereto lawfully authorized.

As to the agent having authority to bind his principal, and the entry of the agent's name as the purchaser, the author-

ities seem to me to establish this, if the purchase is afterwards confirmed by the written acknowledgment of the authority of the agent, which this defendant appears to have given by his letter to the Deputy-Sheriff.

But the question still remains, is the written memorandum, made at the time of the sale, a "sufficient note or memorandum in writing of the said bargain" to comply with the Statute? This memorandum in no part of it shews who was the seller, nor does the memorandum drawn up afterwards. They merely state the articles sold, the price, and the names of the purchasers. In *Blackburn* on the Contract of Sale, at pp. 54, 55, it is stated that the memorandum should disclose who the person is with whom the contract is made; and further, there is no case that I am aware of in which a memorandum that did not disclose who the parties were has been held sufficient; so that the authorities, though not numerous, are uniform. But it is not necessary that the name of the party with whom the contract is made should be inserted, if there be on the face of the memorandum a sufficient description to shew who he is. Here on either memorandum there is no sufficient description to shew who the seller is, except that the second memorandum is signed "D. Howard, Bailiff." This second memorandum, as I understand, was made after the sale was over, and *Mews v. Carr* (1 H. & N. 484), is authority that the defendant cannot be bound by that memorandum.

I think the memorandum defective in this point, under the authorities cited on the argument, many of which are referred to in *Blackburn* on the Contract of Sale.

There is another and still more important omission in the memorandum, and that is the terms of the sale.

One object of the Statute of Frauds was to prevent disputes as to the terms of the sale. In this case we have that dispute at the outset. The plaintiff contends the sale was for cash; the defendant, that the amount was to be applied on his execution, and the evidence as to the actual terms of the sale seem to be conflicting.

In the recent case of *Carregan v. Richards, et al.* (15 L. T.

N. S. 252) Kelly, C. B., referring to an alleged contract (which it was contended was proven by a letter of defendants, but the contract admitted by the letter did not correspond with that set up by plaintiff), said : " Suppose the purchaser had said by word of mouth, I must let my principal see it, and if he approves of the quality I will become the purchaser ; and then suppose that had been set up as a defence, the question then would be, without reference to this note, whether the parol evidence given by the plaintiff or defendant was the truth. But that is just the sort of question which the Legislature did not mean to have left to the jury, and therefore provided that no agreement merely by word of mouth should be good unless there were some memorandum in writing signed by the party."

The only recognition of the sale is the letter of defendant already referred to. He merely says, " About once in every three months Mr. Griffith informs me that the engine on my lot, which belongs to me, and was bid in by Mr. Todd for me, is likely to be sold. The last I heard from him was, that your fees had not been paid, and you intended to sell again." Nothing is here mentioned as to the terms of the sale, and this letter is not sufficient under the Statute of Frauds, according to *Carregan v. Richards et al.*, to bind the defendant.

The next question is, does the plaintiff bring his case within the first exception of the Statute, where " the buyer shall accept part of the goods so sold and actually receive the same?" The evidence shews that the articles were about a mile distant from the place where they were sold, and the bailiff does not pretend there was an actual delivery of any of the articles, though some of them, the cooking-stove, were capable of an actual delivery.

There was some evidence that defendant's servants were working on the place where the engine was before the sale, and the same witness said he had not seen defendant in possession since. Another witness for defendant said, " Spencer and I were in possession of the land, and defendant took possession of the engine."

If the articles purchased were in defendant's possession at the time of the purchase, it might be urged, on the authority of *Edan v. Dudfield* (1 Q. B. 302), that there might be such a dealing with them as would afford evidence of an acceptance of them under an agreement, so as to take it out of the Statute; but Lord Denman says in that case such evidence must be unequivocal, and the question whether it is so (an acceptance) or not, under all the circumstances, is a fact for the jury, not a matter of law for the Court.

The fact of the property being in possession of defendant before the sale is not shewn by the evidence, and, as already observed, there is no evidence to shew there was any delivery of it by the plaintiff to the defendant. The following is written on the margin of the memorandum signed by the Bailiff, "John Rumford put in charge for Sheriff of all the chattels, except what was sold to P. Taylor." This memorandum was not referred to at the trial, nor in the argument; but it seems to shew that when that was made the property was not delivered to defendant or his agent; on the contrary, that the person put in charge was holding it for the Sheriff, and for anything that appears to the contrary, he may still be in charge of the property for the Sheriff. If that be so, there can be no delivery to the purchaser to pass the property, for all the authorities clearly lay down the principle, that, to constitute a delivery to bind the bargain, it must be such a delivery of the possession as destroys the vendor's lien.

I do not think the letter of the defendant is evidence of the delivery. He speaks of the engine on his lot which belongs to him. We have no evidence how it was put there; whether it was a fixture in the ordinary sense; whether when put there there was an oil-well which was being worked by it or not; and he may claim it to be his independent of the purchase. It is true he adds, "and which was bid in by Mr. Todd for me." The expression "bid in" does not necessarily imply that bidding in was what constituted him the owner, but rather confirming a previous right to it.

The bailiff said, " Mr. Griffith gave me an order to credit the amount of Todd's purchases on Elmore's *fi. fa.* I wanted the Sheriff's fees if that was to be done. Griffith and Todd refused to pay the amount of the sale, and they both said they wished to credit on defendant's *fi. fa.* He said he would carry it (the receipt) and give it to the Sheriff. He thought he asked for the amount of the sale, and they refused to pay it. It was after the sale he had this conversation.

The Deputy-Sheriff stated that Mr. Todd always said he would have the matter arranged. He asked him several times to pay the amount of the sale : "he said there was no necessity of paying for his own property."

The attorney for Gilbert stated that he claimed the whole amount of the sale on his execution. He and the defendant's attorney arranged that defendant was to pay Gilbert \$200 and a Division Court execution, in all \$270, which was not carried out: he would have settled on payment of that amount. He said he purchased the walking-beam, but it was to be given to defendant, on his paying the \$270.

In the absence of any evidence of the delivery of the Engine and other articles purchased by Todd to the defendant, or to any person for him, I do not see how the mere statement on his part in his letter, that he owns it, is evidence of such delivery to justify sustaining this action under the Statute of Frands.

It seems to me that every reason which applies for enforcing the requirements of the Statute obtains in this case. There is a dispute as to what the real bargain was, there is a dispute as to who is entitled to the proceeds of the sale, and there appears to have been a dispute as to the ownership of the property sold, and there is no evidence of a delivery in fact, or that the defendant is in actual possession or ever has been of the property. The statement in the letter that the " engine on my lot, which belongs to me " is threatened to be sold again, when accompanying the fact that defendant went to Milwaukee before the sale, and there is no reason to suppose he returned to this Province up to

the bringing of the action, hardly affords evidence of a delivery and acceptance of the articles purchased to satisfy the Statute of Frauds.

On the whole, I think the verdict in this case unsatisfactory. It is true the general doctrine seems to be that the question of acceptance is a fact for the jury, but I fail to see that there is evidence in this case to go to them of any delivery; and the intimation by the Deputy-Sheriff, that he would sell the goods if his fees were not paid, is a strong indication that he had never delivered them to the purchaser, and that in fact they are still in the Sheriff's possession.

Rule absolute to enter non-suit.

COLE V. BUCKLE.

Tenant to repair—Lessee against lessor—Continuing covenant—Measure of damages.

In an action by lessor against lessee for breach of a covenant to repair fences, on or before a certain day. *Held*, 1st. That such a covenant is not a continuing covenant, and damages must therefore be assessed once for all. 2nd. The proper measure of damages in such a case is, the amount by which the beneficial occupation of the premises during the term is lessened.

Whether the cost of repairing would also be a correct method of estimating the damages must depend upon the circumstances of each case.

Semble, If the cost of repairing would be so large as to be out of proportion to the tenant's interest in the premises, he would not be justified in repairing and treating the costs of such repair as his damages.

DECLARATION on a covenant in a lease for seventy acres of cleared land in the Township of Zorra, the demise being for ten years from 20th April, 1862, at the rent thereby reserved, and defendant thereby covenanted that he would put in tenantable repair the house then rented on the premises and occupied by one Hugh Stewart immediately, and as soon after as Stewart should leave the same, and that he defendant would repair and make good the fences

on and around the said premises, on or before the 20th October, 1862: *Breach*, that defendant did not immediately or as soon after as Stewart left the house, or within a reasonable time thereafter, or since, put in tenantable repair the dwelling erected on the premises, and he did not on or before the 20th October, 1862, or at any time since, repair and make good the fences on and around the premises.

Pleas, 1. That defendant did put the house in tenantable repair immediately and as soon after as Hugh Stewart left same.

2. That he did repair and make good the fences on and around said premises before 20th October, 1862.

Issue.

The cause was tried at the last Fall Assizes for the County of Oxford, held before the Chief Justice of Ontario.

The lease set out in the declaration was put in, dated 30th September, 1861, and was made in pursuance of the Act respecting short forms of leases.

By it plaintiff covenanted, amongst other things, to repair; and to keep up fences; and to keep up the fences around the orchard; and to protect and keep the same from damage or injury; and that he would leave the premises in good repair.

Defendant had the right to enter and view state of repair and plaintiff agreed that he would "repair according to notice."

Plaintiff had the privilege of entering on four acres of ash swamp and cutting down and removing such timber as "may be necessary and required for fencing and repairing fences on said premises occupied under the lease."

Evidence was offered, on behalf of plaintiff, to shew that the house and fences on the premises were out of repair at the commencement of the term mentioned in the lease; that defendant made some repairs on the house, putting boards on the roof, and on some part of the fences, but that the roof of the house admitted snow and rain, and that the same was not in tenantable repair. The line-fence between plaintiff and defendant had been repaired by the latter; one

part well, and one part badly. The fences were generally bad. In many panels the rails were rotten, and in places a man could step over the fence. The house was a log house 20 or 30 years old, with a shingle roof. The repairs consisted in putting some boards on the roof. Plaintiff's witnesses proved that on several occasions they saw cattle and other animals on the place trespassing, injuring the crops, and that plaintiff could not pasture his cattle in the fields adjoining, those that were in crop, for fear his own cattle would destroy the growing crops. Some of plaintiff's witnesses thought the place worth by \$100 a year less than it would have been if defendant had made the proper repairs under the lease.

Plaintiff offered evidence to shew that it would cost from \$800 to \$1000 to put the fence and place the premises in a tenantable state. The fences alone would cost from \$480 to \$500.

On the part of defendant evidence was given to shew that he had made repairs of some of the fences, and that plaintiff himself had removed some of the fences, and that \$35 or \$40 would pay the expense of repairing the others. Several witnesses spoke of this sum being sufficient to repair the outside fences, and that plaintiff had removed some of the inside fences to suit his own convenience. One or two witnesses said that they made such repairs on the house as plaintiff and his wife desired, that they expressed themselves satisfied with what had been done. There appeared to have been a plan produced at the trial shewing the fences, &c., on the place, but it was not produced on the argument.

The learned Chief Justice left it to the jury to say whether the covenant had been broken or not. Assuming it had been, he said the damages were such as would reasonably be deemed to be within the contemplation of the parties in making the covenant.

By way of illustration he put the case of a man with a good cleared farm, the fences of which had been burned, who had let it for ten years to a tenant, covenanting to put up

the fences within a limited period. Until that was done the tenant could not well use the land, crop or cultivate it, because, till fenced, all he did was liable to be destroyed or injured by his own cattle. If he abstained on this account from using the land, the non use would, he thought, be a matter that both parties must have contemplated when making their agreement; or, if depending on the lessor fulfilling his contract, the tenant put in crops and they were destroyed, this would be within the same rule. With observations of that character he left the evidence to the jury. He added, as plaintiff did not either directly or impliedly undertake to put up these fences, the question of what it would cost to put up the fences was not the true point of enquiry, but the damage which plaintiff sustained from defendant's not keeping his covenant, and for that reason he did not think that the sum which it would cost to do what the defendant had covenanted to do, would afford the true criterion of the damages which plaintiff had sustained.

Counsel for defendant objected to the charge, contending that the tenant ought to have repaired and charged the cost as damages; that the jury should not have been told that the inability to make the most profitable use of the land was owing to defendant's breach of covenant; that he should not have told the jury that defendant had broken his covenant in not repairing fences, but that plaintiff should have repaired the old fences, as he best could under the circumstances, to protect his crop.

The jury found a verdict for the plaintiff, damages \$400.

In Michaelmas Term last *S. B. Freeman*, Q. C., for defendant, obtained a rule *nisi* for a new trial, for misdirection, in charging the jury that the reduction in the value of the occupation, through want of repair of fences and house, was the rule of damages, and that plaintiff was not bound to repair at all, if the defendant had broken his covenant; whereas the learned Judge should have told the jury that the cost of putting the fences and house in repair

would be the rule of damages ; and also on the ground of excessive damages.

The rule was enlarged until this Term, when *J. T. Anderson* shewed cause :—The evidence given at the trial would have warranted a verdict against defendant to a much larger amount than found by the jury, the witnesses for the plaintiff stating that it would cost from \$800 to \$1000 to have put the premises in proper repair, according to the covenant.

The effect of the charge was that the plaintiff might recover for the injury to his crops and for the damages, by not being able to use the fields as advantageously as he might have done if the defendant had performed his contract. The jury might have given the full value of the repairs and plaintiff may be liable to defendant on his covenant to repair, to keep up fences and to have the premises in good repair. The principle applicable to damages in this action is the same as in an action by the landlord against the tenant on similar covenants: *Mayne on Damages*, 133 to 139; *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 530; *Startup v. Cortazzi*, 2 C. M. & R. 165.

Freeman, contra :—

The learned Judge should have told the jury the proper measure of damages was the cost of putting the premises in repair. In this view the evidence shews the damages were excessive. The defendant's evidence shewed it would cost only about \$40 to put the fences in repair.

RICHARDS, C. J., delivered the judgment of the Court.

The covenant on the defendant's part, to make good the fences on and around the premises on or before the 20th October, 1862, was undoubtedly broken, and the plaintiff might have sued for the breach of it immediately after it was broken. In an action so brought the jury might be properly asked how much the occupation value of the premises to the tenant had been diminished during the whole term by the omission of the landlord to make the repairs he had undertaken to make. It seems to me this rule of damages would

apply equally at any time when the action was brought. Only one action could be brought on the covenants set out in the declaration, as they are not continuing covenants, and plaintiff must recover once for all whatever damages he is to receive under these covenants. I am not prepared to say that he may omit to cultivate entirely and then claim as damages the rent he has to pay and the value of his own time and wages to servants, &c., that he may have employed with a view of cultivating the farm. The rule of damages at one time laid down in actions against employers for improperly dismissing a servant in the middle of his term, that the servant might wait until the end of the term, remain idle, though willing to serve his master, and then sue for the whole period of his engagement, on the doctrine of constructive service, is now overruled: *Mayne on Damages*, 108-109. I do not think that the plaintiff, in an action like this, on the same principle, could lie by and do nothing because the fence was not made, and yet claim for the value of his time and those of his servants whom he had employed to cultivate the farm. I think the true measure of damage is how much less is his lease worth per annum from the want of repairs. One mode of estimating that value no doubt would be, to consider what it would cost to make the repairs. It does not necessarily follow that that would be the true measure of damages, because, if the term was only for one year, the cost of making the repairs might exceed by far the whole yearly value of the premises, and any damages which the lessee would sustain from the want of the repairs. The damages must depend upon the special circumstances of each case; for while a tenant for one year might be justified in leaving extensive and costly repairs undone, because he could never be compensated therefor by his cultivation of the farm for so short a period, the tenant for fifty years might not be justified in pursuing the like course every year of his fifty years.

I think, therefore, the exceptions taken in the rule to the charge of the learned Chief Justice cannot prevail, and

we cannot grant the new trial on the grounds taken in the rule.

Then, as to excessive damages.

The whole case was of such a character that a jury of farmers would be able to understand and appreciate the evidence, and, unless it manifestly appears that the verdict is wrong, we ought not to interfere.

It is true the defendant's witnesses say that the outside fences could be put in repair for about \$40 or so, but they did not consider the inside fences, which the plaintiff, as they said, had removed for his own purposes. If these purposes were to repair the outside fences, of course the defendant ought not to complain, and the omission to consider the want of inside fences may have materially affected the estimate of damages. Besides this, the plaintiff himself has entered into express independent covenants with the defendant to repair and to keep up fences, and to leave the premises in good repair; and the liability, which may attach to him under these covenants, may to some extent indemnify the defendant for any supposed excess in the amount of the verdict. The plaintiff may feel bound under these covenants to repair and keep up the fences in a substantial manner, and if so kept up and delivered to defendant, of course the property will be benefitted thereby.

On the whole, I do not think we can set aside the verdict on the grounds taken in the rule, which must therefore be discharged.

Rule discharged.

GORE BANK V. McWHIRTER.

Action on bills of exchange—Mortgage as collateral security—Merger—Pleading.

To an action on bills of exchange defendant pleaded that E., another party to the bills, had given plaintiffs a mortgage containing a covenant to pay the amount of the bills, and that the remedy on the bills was merged in the higher security:

Held, that the mortgage being expressed to have been given as "further security," and there being a provision that it should stand as security for any renewal of the bills, the mortgage was collateral and did not merge the remedy on the simple contract.

Held, also, that the remedy on the specialty and on the simple contract, not being *co-extensive*, or between the same parties, the doctrine of merger did not apply.

Action on six bills of exchange, amounting to \$18,000 in all.

Pleas to the several counts of the declaration:—First, That defendant did not indorse said several bills of exchange to said A. Eaton (the payee), nor did said A. Eaton indorse same to plaintiffs.

2. That plaintiffs were not, at commencement of suit, holders of said several bills.

3. To first count, that bill of exchange in that count mentioned was not duly presented for payment, as alleged.

4. To same count, that defendant had not due notice of dishonor of said bill.

5. To third and sixth counts, that defendant did not accept bills in these counts mentioned.

6. To same counts, that said bills of exchange accepted by defendant for accommodation of the said A. Eaton without value, of which plaintiffs had notice, and after maturity, and while plaintiffs were holders, they were merged and extinguished by said A. Eaton executing and delivering to said plaintiffs a certain deed (which plaintiffs accepted), wherein and whereby said Eaton covenanted to pay plaintiff's bills in these counts mentioned.

7. To same counts, that defendant accepted said bills, at request of plaintiffs and said Eaton, without value, and said Eaton indorsed same to plaintiffs for valuable con-

sideration, of which plaintiffs had notice, and after maturity, and while plaintiffs were holders, it was agreed between plaintiffs, said Eaton and defendant, that said Eaton should execute and deliver to plaintiffs a deed containing a covenant to pay amount of bills of exchange in those counts mentioned, with bills mentioned in declaration, in full satisfaction and discharge of defendant's acceptance: Averment, that in pursuance of said agreement, Eaton, before suit, executed and delivered to plaintiffs a deed (which plaintiffs accepted), containing the covenant aforesaid, in full satisfaction and discharge of said bills of exchange in those counts mentioned, and of defendant's acceptances thereof, and of all causes of action in respect thereof, whereby the acceptances of defendant, and all causes of action in respect thereof, became satisfied and discharged.

8. To first, second, fourth, and fifth counts, the residue of the declaration, a plea of merger and extinguishment to same effect as sixth plea, except averment as to defendant's being an accommodation acceptor, it being alleged in these counts that defendant was indorser, the different pleas attempting to draw the distinction that where a person accepts for the accommodation of another, he would be in the same position as an indorser, and the contention being, on the part of defendant in that case, that the taking of a deed from the party who is primarily liable, is a merger and extinguishment of the original debt, whereby he, as surety, would become discharged.

9. To same counts, a plea of accord and satisfaction in same form as seventh plea, except that it was not alleged that defendant indorsed bills at request of plaintiffs.

Issue.

The cause was tried at the Fall Assizes of 1867 for the County of Oxford, before the Chief Justice of Ontario.

At the trial it was attempted to defeat the plaintiffs under the first two pleas, on the ground that the action was brought in the name of the Gore Bank instead of The

President, Directors, and Company of the Gore Bank (see 23 Vic., cap 116); but the Judge permitted the plaintiffs to amend.

It was agreed as to the fifth, sixth, seventh, eighth and ninth issues joined, that a verdict should be entered for the plaintiffs, with leave reserved to the defendant to move to enter a verdict for him on those issues, if the Court should be of opinion that there was a merger and extinguishment of the bills in the taking of the mortgage set out in the pleadings, and proved to have been made and executed by the said A. Eaton to the Gore Bank, and in which it was recited that Eaton was indebted to the plaintiffs in the sum of \$18,000, which was represented and shewn upon, in and by the several bills of exchange set forth and described in the schedule to the said mortgage attached, and that the plaintiffs had agreed to take and accept for their security, by way of mortgage upon real estate, from said Eaton, *for the payment* of the said debt, for which purpose said mortgage was made, and it was witnessed that in pursuance thereof said Eaton did grant and mortgage unto the plaintiffs the lands therein mentioned: Proviso, Mortgage to be void on payment by said Eaton, *or by some one or other of the other parties thereto*, of the several bills described in the schedule to the said mortgage annexed, or renewals thereof, *it being distinctly understood that the security thereby created should continue in force until the whole of the said indebtedness, and all interest and charges thereon, should be lawfully paid off to the Bank in cash.*

To the mortgage were annexed the several bills of exchange set out in the declaration.

It was also proved on these issues that the defendant was only an accommodation acceptor and indorser of the bills.

As to the third and fourth issues joined, they were left to the jury, and they found for the plaintiffs.

In Michaelmas Term last a rule *nisi* was obtained, on the leave reserved, to enter a verdict for the defendant.

M. C. Cameron, Q. C., and *E. Crombie*, shewed cause, citing *Shaw v. Crawford*, 16 U. C. 101; *Twopenny v. Young*, 3 B. & C. 208; *Parker v. McCrae*, 7 C. P. 124; *Ansell v. Baker*, 15 Q. B. 20; *Mathewson v. Brouse*, 1 U. C. 272; *Murray v. Miller*, ib. 353; *McLeod v. McKay et al.*, 20 U. C. 258; *Fairman v. Maybee*, 7 C. P. 467.

James Paterson, contra, cited *Manley v. Boycot*, 22 L. J., Q. B. 65; *Commercial Bank v. Cuvillier*, 18 U. C. 378; *Price v. Moulton*, 10 C. B. 561; *Sharpe v. Gibbs*, 16 C. B. N. S. 527.

J. WILSON, J., delivered the judgment of the Court.

The general rule is that where a security of a higher nature is taken for the same debt, it merges the lower security. The law does not permit distinct securities of different degrees for the same debt, but it allows of any number of collateral securities for it. The questions in this case are, first, whether the taking of this mortgage merged the remedy on the bills in the third and sixth counts mentioned; and secondly, whether the plaintiffs took the mortgage in satisfaction of these bills, and of those mentioned in the first, second, fourth and fifth counts.

Merger is an operation of law not depending upon the intention of the parties. Satisfaction arises from the act of the parties, and is not controlled by law, but by their own agreement: *Sharpe v. Gibb et al.*, 16 C. B. N. S. 527.

The bill mentioned in the third count is dated 25th October, 1866, drawn by A. Eaton, payable to his own order, thirty days after date, for \$1,300, directed to McWhirter & White, who accepted it. The defendant and his partner were, therefore, the parties primarily liable on the bill.

The one mentioned in the sixth count is dated 26th November, 1866, drawn and accepted as the other, for \$2,650, at thirty days after date.

The defendant pleads that these bills were accepted by him for the accommodation of Eaton, who proves they were; but the plaintiffs had no notice that this was so and were innocent holders of them for value.

After these and the other bills became due, the plaintiffs were informed that the parties to them could not pay them. On being pressed for payment the defendant said Eaton would most likely give a mortgage *to secure the bills*. Eaton says the defendant knew he was going to make the mortgage, that both he and the defendant saw the plaintiffs' agent together, and it was then agreed that Eaton should give the mortgage for security of the paper (*i.e.*, the bills), and the defendant, he believed, went to Hamilton to see Mr. Cassells, the plaintiffs' manager, about it.

The mortgage is dated the thirteenth day of November, 1866, made between Andrew Eaton, of the first part, the plaintiffs of the second part, and Wm. Eaton of the third part. It was executed about the day of . Attached to it is a schedule of the bills set out on this record. The proviso is, "This mortgage is to be void on payment by the party of the first part to the party of the second part, or its assigns, or by some one or other of the parties thereto, or on his or their behalf, of the several bills of exchange described in the said schedule to these presents attached, or renewals, or other bank paper, promissory notes, or bills of exchange, accepted for the same or any of the said bills of exchange, or any part thereof, should the said party of the second part, or its assigns, accept said other bank paper, bills of exchange, or promissory notes, by way of granting further time for the payment of the said indebtedness; it being distinctly understood that the security hereby created shall continue in force until the whole of the said indebtedness, and all interest and charges accruing thereon, are fully paid off to the said Gore Bank, or its assigns, in cash."

The covenant is, "that the party of the first part will pay the said mortgage money and interest, and observe the above proviso."

In *Ansell et al. v. Baker* (15 Q. B. N. S. 20) one of two makers of a joint and several promissory note gave the holder a mortgage to secure the amount, with a covenant to pay it: it was held the other maker was not discharged,

because the remedy on the speciality was not co-extensive with the remedy on the note.

The remedy on the higher security must be co-extensive with that of the lower, or there will be no merger: *Chitty* on Contracts, 4 ed. 677.

In this case the remedy against the defendant was not merged by the plaintiffs taking the mortgage of Eaton to secure the amount of the bills. *Sharpe v. Gibbs et al.* (16 C. B. N. S. 527), is an authority shewing that where two of three persons, indebted to the mortgagee on a simple contract debt, executed a mortgage for the debt, it was held not to merge the remedy on the simple contract debt. To create a merger the simple contract debt must in its entirety become a specialty, and the remedy on the deed must be co-extensive with that for the simple contract debt; but there is no merger if the higher security is only collateral, and the remedy is left on the simple contract debt.

The proviso here shews that the parties contemplated the renewing of these bills, or otherwise changing them in the future, and the security was to stand until not only these bills, but any others taken for them, were paid. The covenant is not artificially drawn, but we may fairly read it as a covenant to pay the money, in the mortgage mentioned, in the terms of the proviso.

In *The Norfolk Railway Company v. McNamara* (3 Ex. 628), where a bond had been given by the defendant and his sureties, with a condition that if the defendant should pay the plaintiffs the sum then due, and such further sums as might become due, it was held no merger, and and the plaintiffs might recover the original debt in an *indebitatus* count. In *Holmes v. Bell* (3 M. & G. 220) the same doctrine was laid down. See also *Bell v. Banks* (3 M. & G. 258).

On the authority of these cases, we think, there was no merger of the bills mentioned in the third and sixth counts, because the remedy was not co-extensive or between the same parties, and the deed shews that it was a

collateral security; nor did the remedy on the other bills merge, because the mortgage was collateral.

The defendant wholly failed to prove the plaintiff took the mortgage in satisfaction of all the bills. The rule will be discharged.

Rule discharged. (a)

MEMORANDUM.

During this Term the following gentlemen were called to the Bar :—T. S. KENNEDY, E. MEREDITH, P. McNULTY, C. McFADYEN, F. E. BURNHAM, W. H. LOWE, W. MOSGROVE.

(a) See Gore Bank v. Eaton, 27 U. C. 332.

EASTER TERM, 31 VICTORIA, 1868.

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.*

THE BANK OF UPPER CANADA V. MERCER.

Action on judgment—Plea of judgment recovered against, and payment by, co-surety—Pleading.

To a declaration on a judgment recovered against defendant in the Court of Queen's Bench for damages and costs, defendant pleaded that the judgment was recovered upon a promissory note made by defendant, payable to the order of one Scott, who endorsed to one Scanlon, who endorsed and delivered to plaintiffs, who became and were the holders at the time of the recovery of said judgment; that defendant made the note, and Scanlon endorsed, for Scott's accommodation, and as his surety, to secure a debt due from him to plaintiffs, and that when the note was made, endorsed and delivered it was agreed between defendant, Scott, Scanlon and plaintiffs, that defendant and Scanlon should be liable thereon to plaintiffs as sureties for Scott, and that except as aforesaid there was no value or consideration for the making, indorsing or payment of the note by defendant or Scanlon; that Scott having made default in payment of his debt, plaintiffs sued Scanlon as endorser, and recovered judgment against him, being the same debt for which the judgment declared upon in this action was recovered, and Scanlon afterwards and before action satisfied the amount of the said judgment and costs by payment to plaintiffs, and therewith and thereby paid and satisfied plaintiffs' claim in respect of the cause of action in the introductory part of the plea mentioned: *Held*, on demurrer, a bad plea.

DECLARATION on a judgment recovered on 6th November, 1846, for £100 debt and £5 costs.

Plea. That as to the judgment and cause of action in the declaration mentioned, except as to the costs, said judgment was recovered for and upon a certain note, dated 4th December, 1845, made by defendant, payable ninety days after

* Was absent from indisposition.

date at the office of the Bank of Upper Canada in London, to one George Scott, or order, for £50, and said note was endorsed by said Scott to one John Scanlon, who endorsed and delivered it to plaintiffs, who became holders thereof, and were holders at the time of the recovery of said judgment; that the said defendant made the said note, and Scanlon endorsed it, for the accommodation of Scott, and as his surety, to secure a debt due from Scott to the plaintiffs, and when the note was made, endorsed and delivered, it was agreed between defendant Scott, Scanlon and plaintiffs, that defendant and Scanlon should be liable as such surety; and that there was no value or consideration, except as aforesaid, for defendant or Scanlon making, indorsing or paying said note; that said Scott made default in payment of his debt, and the said note being dishonored, plaintiffs sued Scanlon as indorser for the amount thereof, being the same identical debt and cause of action for which said judgment against defendant in the declaration mentioned was recovered, and afterwards recovered judgment against Scanlon for the full amount of said note, and said Scanlon before this action satisfied the amount of said judgment and costs by payment thereof to the plaintiffs.

DEMURRER.—1. That the payment by Scanlon, in said plea named, of the amount of the judgment against him, therein mentioned, could not, under the circumstances in said plea set forth, in law operate as or be a satisfaction of the judgment in plaintiffs' declaration, or any part of the same, and notwithstanding anything appearing in or by said plea the judgment mentioned in said declaration was, as a matter of law, in full force against defendant.

2. That said plea professed to set up a matter *in pais* in answer to an action on a record, which could not be done at common law, and said plea was not within the meaning of any Statute or law authorizing the same to be done.

Thomas Ferguson, for the demurrer, cited 4 & 5 Anne, ch. 12, sec. 16; *Ch. Pl. I. 718, II. 512; Bank of Montreal v.*

Armour, 9 C. P. 401; *Jones v. Broadhurst*, 9 C. B. 173; *Saund.* Pl. 2 ed. III. 658, II. 254.

C. Robinson, Q. C., contra, cited 9 C. P. 401; 12 C. B. 261; 9 C. B. 178, 181; 10 C. B. N. S. 561; 13 C. B. 909; *Ch. Bills*, 10 ed. 269; *Batchelor v. Lawrence*, 9 C. B. N. S. 543; *Brown v. Gossage*, 15 C. P. 120; *Smith's L. C.* last ed. 152, 153.

RICHARDS, C. J., delivered the judgment of the Court.

Assuming this plea to be in form a plea answering the whole cause of action, the debt and damages, by the payment of the judgment in favor of the Bank against the co-indorser, and the costs, by payment of the amount of the costs, I yet think the plea in substance bad.

The only way in which the matter of this plea can be made available in the action on the judgment is by pleading it under the Statute of Anne, as payment.

The plea must shew payment in effect, if not actual payment, of the judgment. Supposing the Bank, whilst the action against this defendant was pending and before the judgment was obtained, or plea pleaded, had received from Scanlon the amount of the debt and costs, could this defendant have set that up against the further prosecution of the action, without shewing that the payment made by Scanlon was in satisfaction of the note, or to discharge the defendant's liability thereon?

The Bank of Montreal v. Armour (9 U. C. C. P.) and the case there referred to shew clearly that, if this defendant is to be viewed as the maker of the note between him and Scanlon, the payment of this judgment by Scanlon would make no difference as to the Bank maintaining this action. There is no doubt room for much argument that in the present case, on the facts alleged in the plea, the position of Scanlon in reference to the defendant is different to what it would have been had the defendant been the maker of the note for his own benefit.

One test occurs to me, which the reading of the cases suggests. If Scanlon had paid the note after suit and

before judgment, could he be said to have extinguished the note? If not, which I apprehend is the case, could not Scanlon have sued this defendant on the note? And if he had, could the defendant have successfully defended the suit on the ground that he was not liable to Scanlon on the note at all?

Reynolds v. Whalen (10 C. B. N. S. 561) shews that acceptors and indorsers of Bills of Exchange may be considered in the light of sureties for the drawer, or even for an indorsee, without regard to the order in which the names of the parties appear on the bill; so that the party, whose name appears on the bill, as drawer, may maintain an action for contribution against one whose name appears as indorser on the same bill, when it has been paid by such drawer.

The action for contribution is based so purely on equitable doctrines, that, when it is clearly shewn that the right exists, the action will be sustained.

If, in the action brought by these plaintiffs on this promissory note, it had been shewn that, in the action brought against Scanlon, the latter had paid the amount due on the note, he having indorsed it for the accommodation of Scott, and the defendant having made it for the like accommodation, could the defendant, on shewing these facts, under a plea of payment, expect to have a verdict, though nothing more was shewn and it was very clear he had paid nothing? I should think not. The defendant and Scanlon were not joint contractors, in any sense, with the plaintiff at common law. They could not have been sued as such, and unless they are to be viewed in that light, a payment by Scanlon, unless intended to satisfy the note, and made as well on behalf of the defendant as of himself, could be set up as payment of the note.

If the plaintiffs recover the amount due on this judgment, they will probably be trustees for Scanlon for the amount that is due to him.

If the defendant, in the case I have supposed, would not be at liberty, under a plea of payment, to set up the payment of the debt in the suit against Scanlon, as a discharge,

on the state of facts presented in this plea, *a fortiori* he could not set them up in an action on this judgment. This is an informal plea of payment, when the facts stated do not shew a payment as such ; or it is a bad plea, setting up the facts as accord and satisfaction of this judgment, when no such accord is shewn, and when no such plea can under the Statute be pleaded.

The relief which the defendant ought to have can probably be obtained by applying to the equitable powers of the Court of Queen's Bench, and paying his proper share of the original indebtedness on the note, whatever that may be, particularly if plaintiffs are going on with this action for the benefit of Scanlon, as was intimated on this argument.

The only way in which the facts stated could be made available by a plea would be under a plea of payment, when a jury might be asked to say, from the facts stated, the lapse of time and other circumstances, whether the payment made by Scanlon was not made in satisfaction of this judgment. This, I think, would be very doubtful, for it in the end comes to this, can the payment of one judgment by a person, not a joint contractor, paid to discharge his own liability, be considered as a payment by another person of another judgment, though it may be for the same debt ? I do not mean to say that such payment may not in many instances be made available by a defendant, and the cases referred to in 2 *William Saunders*, 147, and notes, shew that under an *audita querela* relief will be given when a defendant shews that an execution has issued on a judgment when it ought not to issue.

Under the Mercantile Law Amendment Act there is no doubt, if this payment had been made since the passing of that Act, Scanlon could have enforced this judgment against this defendant for such portion of the original debt as the defendant was liable to pay to him.

There will be judgment for the plaintiff on the demurrer.

Judgment for plaintiff on demurrer.

COONS V. THE ÆTNA INSURANCE COMPANY.

Marine insurance—Unseaworthiness—Evidence.

In a policy of insurance on a vessel belonging to plaintiff, insuring only against perils *of the sea*, one of the conditions was that the defendants were not to be liable for loss or damage arising from unseaworthiness. The vessel in question, some fifteen minutes after she had left port, began to leak and in about five hours went down. Both weather and water, it appeared, were at the time perfectly calm, and no actively adverse cause could be or was assigned for the accident, nor was any evidence given by plaintiff to rebut the presumption, which, it was contended, therefore arose, that the loss was not occasioned by perils of the sea :

Held, that plaintiff was bound to have given this evidence and that the absence of it disentitled him to recover.

The plaintiff's steam tug, *R. Howard*, was insured by the defendants in the sum of \$5,000 from the 1st of April, 1867, to the 15th of December following, against perils of the lakes, rivers, canals, fires and jettisons, excepting perils, losses, misfortunes or expenses consequent upon and arising from or caused by the following or other legally excluded causes ; namely, damages that might be done by the said tug to any other vessel or property, incompetency of the master, or insufficiency of the crew, or want of ordinary care and skill in navigating the vessel, and in loading, stowing and securing the cargo, rottenness, inherent defects, overloading and all other unseaworthiness, &c. Averment of loss by perils insured against and not from or by reason of the excepted perils or casualties.

The pleas, on which the questions arose, were :

2. That the vessel was not lost as alleged.

3. That the loss arose and was occasioned by want of ordinary care and skill in navigating the vessel, and not from or by reason of any of the adventures and perils which the defendants agreed to bear and take on themselves.

4. That the loss arose and was occasioned by the unseaworthiness of the vessel, and not from or by reason of any of the adventures and perils which the defendants agreed to bear and take on themselves.

Issue.

The cause was tried at the last Spring Assizes held at Cayuga, before Hagarty, J.

The following evidence was given :

George Coons, the engineer on board, said : " The tug left Toronto at half-past twelve, on 24th October. We found a leak under stern below shaft : put two pumps on : seemed as if some of the planks gave way : we were twelve or fifteen minutes out : she was in good order when we left Toronto : she leaked a little when we entered Toronto : when we left she was not leaking more than usual : we put pony engine on and two pumps and one hand pump : we were towing boats : we were about five hours out when she went down : we tried to put rags and quilts into leak : hands were called off the scows in tow : the scows refused to let us lash to them : we used all our skill and care : tried our best and could not stop leak : Captain sent a boat on shore to get a tug to take us in : a tug came out, but we sank before she reached us : we were seaworthy when we left Toronto : had three light scows in tow : think leak was caused by some planks springing."

On cross-examination : " There was no storm : the wind was beginning to rise, but no sea on or wind when it happened : we pumped her out two or three times the night before with the engine : we had gone into Toronto the day before, about five, P.M. : it was then calm : just as she was going in I noticed she was leaking : I pumped her out two or three times that night : she had leaked at the stern pipe, but we had her in dock a month before and cured it : she was caulked : I never said the bolts were too short for the nuts : in the dock the nuts and bolts were cut : she did not leak from that time till the time in question : the working of the shaft had stopped them, but we had not been running long enough for the shaft to stop them again : I signed document produced : I did not swear to it : it was read over to me : I put my name to it : I think I did say the jar of the shaft may have worked in the planks : did not say I so thought : she was an old

boat and perhaps it was so caused: two nuts on the stuffing box: two on each bolt: she leaked in Toronto from the stuffing box: next day on the lake the water came in: not there: it came round from the post like: I could not see below the box from the water on the lake: the pony engine did not pump from the night before: not that morning: we could not find out the cause of the leak: a plank might start in calm weather from being unsound or badly fixed: we were twelve or fifteen miles out before we began to pump."

Re-examination: "It was nine the night before when we last used the engine for pumping: sometimes we use the bilge pump."

John Evans, a labourer, said, "I saw them trying to force quilts into the leak: the planks burst or gave way just under the shaft, as I thought: the water was rushing in there: I thought the planks had given way: it was near the stern-post."

John McQuinn, fireman on tug, said, "The vessel seemed all right leaving Toronto."

Alonzo Quackenbush, captain of a tug, said, "I knew the tug: she was considered a good boat of her age: there is a continual jar in tugging: striking any object might start the stern-post: have not known such a case: by the wheel striking a log she might start her stern-post: she was built in 1855 or 1856, an old boat: a blow to hurt the stern-post every one would feel."

Joseph Hall, an old sailor, said: "Consider this a good strong boat: it is usual when stuffing box stuffed for vessel to leak a little: then it is screwed up again: have known a leak sink a ship that could not be accounted for: new ships may leak also: I knew vessels leak more in calms than in a gale."

Defendants' counsel moved for a nonsuit, because there was no evidence that the loss was from the perils insured against; that when she sank in a calm sea there was no presumption the loss was from perils of the sea; there must have been some inherent defect, and the plaintiff was bound to account for the loss.

Leave was reserved to the defendant to move for a nonsuit, if the Court should be of opinion that there was no evidence which should have been submitted to the jury.

The jury found a verdict for the plaintiff and \$5150 damages.

Anderson obtained a rule to set aside the verdict and enter a nonsuit, on the ground that there was no evidence of loss by the perils insured against, and that the evidence raised a presumption of unseaworthiness, and that the burden of proof was on the plaintiff to rebut such presumption, and no such evidence was given; or for a new trial, on the ground of misdirection, and on the ground that the verdict was against law and evidence.

Harrison, Q. C., shewed cause:—

As to what are perils of the sea see *Selw.* : N. P., 8th ed., 385, 9th ed., 966; *Patterson v. Harris* 7 Jur. N. S. 1276; *Burges v. Wickham*, 10 Jur. N. S. 92; *Clapham v. Langton*, 34 L. J. Q. B. 46.

The question was for the jury: *Knill v. Hooper*, 2 H. & N. 277-284.

More liberality is allowed on time policies such as this: *Thompson v. Hopper*, 6 E. & B. 172; *Fawcus v. Sarsfield*, 6 E. & B. 192; *Jenkins v. Heycock*, 8 Moore's P. C. 351; *Gibson v. Small*, 4 H. L. 353; *Dixon v. Sadler*, 5 M. & W. 405; *Biccard v. Shepherd*, 14 Moore's P. C. 494; *Parker v. Potts*, 3 Dow. 23.

Such an injury and accident as this might, perhaps, have to be explained when happening to a sailing vessel, but not to a steamer, and engaged on such a service as tugging, and to a boat of the age which this one was known by the defendants to be: *Douglas v. Winn*, 4 Dow. 269, 559.

There was evidence, however, showing that the vessel was rightly found to have been injured by a peril of the sea, and that it did not arise from unseaworthiness: *Bouillon v. Lupton*, 15 C. B. N. S. 113, 422; *Gillespie v. British America Fire and Life Assurance Company*, 7 U. C. 108.

Anderson, contra :—The danger insured against was only from perils of *the sea*, not from *other* perils, as many policies are drawn, nor is it from perils *on* the sea, but of the sea : 2 *Marsh.* on Insurance, 487 ; *Cullen v. Butler*, 5 M. & S. 451 ; *Montoya v. The London Assurance Company*, 6 Exch. 451.

The exception here, that the defendants were not to be responsible for accidents arising from any rottenness of, or inherent defect in the vessel, entitled them on the facts of the case to a verdict, no explanation having been given by the plaintiffs to do away with the presumption, from the time, place and manner of the happening of the accident, that it arose from rottenness or inherent defect, or unseaworthiness : *Parke* on Insurance, 469 ; *Taylor* on Evidence, 5th ed. sec. 162.

The vessel, too, should have been seaworthy on leaving the port of Toronto on the day of the loss : it was not sufficient she was seaworthy at the beginning of the season or a considerable time before : she should have been seaworthy on leaving every port.

A. WILSON, J., delivered the judgment of the Court.

The terms of this policy must determine the rights of parties. The provisions which save the defendants from liability in case of unseaworthiness, rottenness and inherent defects, give to the defendants every protection which they could have had by a voyage policy, and so it is of no consequence whether this be called a time or a voyage policy.

The observations of Cockburn, C. J., in *Paterson v. Harris* (7 Jur. N. S. 1279), are very applicable here :

“The purpose of insurance is to afford protection against contingencies and damages which may or may not occur : it cannot properly apply to a case where the loss or injury must take place in the ordinary course of things. The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the sea, as being the unavoidable consequences of the service

to which the vessel is exposed: the insurer cannot be understood as undertaking to indemnify against losses which in the nature of things must necessarily happen."

"Seaworthiness" is a relative term dependent on the employment the vessel is intended for: *Knill v. Hooper* (2 H. & N. 277); or it may be dependent on a particular vessel being made as fit for a certain trade or a particular navigation as such vessel can be made, so long as the nature of the vessel and her intended employment were known to her insurer: *Clapham v. Langton* (34 L. J. Q. B. 46); *Burges v. Wickham* (10 Jur. N. S. 92).

The defendants also traverse that the vessel was lost by perils of the sea, and they contend that the going down of the tug in a calm state of the weather, of both wind and water, is evidence so far in their favour as to call on the plaintiff to rebut the presumption, if he can, that the loss was not occasioned by perils of the sea. One witness said, "I think the leak was caused by some planks springing. * * * I did say the jar of the shaft may have worked in the planks * * * and perhaps it was so caused. * * * We could not find out the cause of the leak: a plank might start in calm weather from being unsound or badly fixed." Another witness said, "The planks burst or gave way just under the shaft, as I thought—near the stern post." A third witness said, "I have known a leak sink a ship that could not be accounted for. I know vessels leak more in calms than in a gale." A fourth witness said, "Striking an object might start the stern post: a blow to hurt the stern post every one would feel." But it was not shewn the vessel had ever received such an injury at all; and though there may be evidence that the loss was caused by the plank or planks near the shaft springing, starting, bursting or giving way, there is no explanation how, or from what cause this happened. One witness said, "Perhaps it was caused by the jar of the shaft working in the planks," or, "a plank might start in calm weather from being unsound or badly fixed." From which of these causes, or whether it was from either of them, was not

said: the probability is that the leak could not be accounted for, and that it was such an unaccountable leak as the witness said he had known to sink a ship.

A loss, happening by the starting of a plank from the shaft working, would probably be a loss by perils of the sea: *Laurie v. Douglas* (15 M. & W. 746); and also, if happening by its having been badly fixed, or put in an unsound state; but then the cause of starting, and certainly the unsoundness or bad fixing, would seem to shew that the vessel could not have been seaworthy when the accident happened in such calm weather, and no explanation was given shewing any previous injury had led to this, or that anything had happened at the time to which the starting of the plank, if it happened in that way, can be attributed.

It is not necessary to say as a rule of law, that if this be a time policy, seaworthiness is not implied at the commencement of the venture or at any time; or if it be construed as a voyage policy, that soundness need only exist at the commencement of the risk, and need not continue throughout the voyage: it is only necessary to say that this policy expressly provides that the defendants shall not pay for loss or damage, which happens from unseaworthiness, and in this policy the meaning of the contract is, that the seaworthiness shall be continuous throughout the period insured for. What is seaworthiness is very lucidly stated in Mr. Justice Blackburn's judgment in *Burges v. Wickham* (10 Jur. N. S. 95, 6, 7).

The issue was whether the loss happened from unseaworthiness. The evidence shewed a case which *primâ facie* shewed unseaworthiness, and it was not explained or rebutted. The defendants were not obliged to prove it affirmatively in the absence of all evidence to make out a *primâ facie* case, and for this reason the defendants were entitled to a nonsuit.

How far the insurers, knowing the age and build and materials of which the vessel was built at the time of the insurance might be held to modify the condition as to sea-

worthiness, so as to make it subordinate to the particular vessel they were insuring, according to the principle of the cases in 34 L. J. Q. B. 46, and 10 Jur. N. S. 92, above mentioned, we are not called on to say, as no such view was presented at any time in the progress of this cause.

On the facts before us, on the affidavits now filed, the rule will be absolute for a new trial.

*Rule absolute for new trial, on payment
of costs by plaintiff.*

YOUNG ET AL. V. CROSSLAND ET AL.

Implied covenant—Construction—Pleading.

The declaration stated that the defendants covenaned with the plaintiffs that the plaintiffs should make them advances either in money or wool : that the defendants would buy wool with moneys advanced : that the plaintiffs should have a lien on all the wool, and might insure it and charge the premiums as advances : that the wool, as manufactured, should be consigned to the plaintiffs for sale : that the plaintiffs should be entitled to $1\frac{1}{2}$ per cent. commission on advances, and 5 per cent. on sales, and that plaintiff should carry proceeds of sales to defendants credit, after deducting the advances on commission: Averment, that plaintiffs made advances, paid insurances and made sales, and credited defendants with the proceeds, less the advances and commission to which plaintiff became entitled, in addition to the balances due to them for advances and interest, to large sums for commission under the agreement, and that upon the closing of the agreement there was due to the plaintiffs a large sum, as the balance due thereunder : Breach, that the defendants had not paid.

Held, on demurrer.—1st That upon the sale of all the goods delivered by the defendants to the plaintiff, an action might lie on the covenant for any balance due to the plaintiffs for advances and commission, as a liability to be implied from the tenor of the agreement.

2nd. That the expression, “upon the closing of the agreement,” was not equivalent to an averment that the plaintiffs had no goods of the defendant still on hand to be sold, and that the declaration was therefore insufficient.

THE declaration is sufficiently stated in the headnote to the case and in the judgment of the Court.

The defendants demurred on the following grounds :

1. That no breach of the alleged covenant was shewn.

2. That the count disclosed no cause of action against the defendants on the covenant declared on, and no breach of the said covenant.

3. That it was uncertain, in not shewing whether the plaintiffs were proceeding on the covenant or on the agreement set out in the introductory part of the said count, and the said count embraced claims under the said last mentioned agreement, which it did not appear that the defendant ever covenanted to perform.

Moss, for the demurrer :—

The covenant gives plaintiff a lien on the wool, &c.

There is no covenant by the defendant to pay any money which may be charged to him in respect of the transactions under this agreement, and the only breach alleged against the defendant is that he has not paid such money. The defendant has kept all his covenants, and is therefore not liable.

Burton, Q. C. contra :—

The action will lie at any rate for his commission on advances : *Middleditch v. Ellis*, 2 Ex. 623. He also cited *Tilson v. Warwick Gas Co.*, 7 D. & R. 376.

A. WILSON, J., delivered the judgment of the Court.

The defendants covenanted either expressly or by implication :

1. To buy wool with advances.

2. That plaintiffs and Law should have a lien on it.

3. That plaintiffs and Law might insure it and charge premiums as advances.

4. That defendants should consign all their manufactures to plaintiffs and Law and deliver the same to plaintiffs and Law, as manufactured.

5. That plaintiffs should retain lien on wool till it was manufactured.

6. That plaintiffs and Law should be entitled to 1½ per

cent. for advances, five for sale and guarantee, and seven per cent. and interest.

7. Plaintiffs and Law should carry proceeds of sales to defendants' credit, after deducting advances and commission.

The breach is, that Law and plaintiffs made advances, paid premiums, made sales, and with the proceeds of sales, less the advances and commission, the defendants were credited in account, whereby plaintiffs and Law became entitled, in addition to the balances due to them for advances and interest, to large sums for commission under the agreement; and at the closing of the said agreement there was due to the plaintiff and Law, on account of such various dealings, a large sum of money, to wit, \$2660.41 as the balance due under the agreement, yet defendants have not paid the same.

It is clear that from this contract the plaintiffs and Law might happen to overpay the defendants more than the plaintiffs and Law might get back, or that the debit side of their account against the defendants might be more than the credit side.

The plaintiffs and Law might advance and were bound to advance as much as eighty per cent. on the value of the goods, if the defendant required it, and the goods might sell for less than the advance made; or, including one-and-a-half per cent on advances, insurance, interest, and five per cent. on sales and the advances, the claim against defendants might be considerably more than the proceeds of the sales.

The parties contemplated that the proceeds of sales would exceed the advance and five per cent. commission, for they provide that, after deducting such advances and commission, the proceeds of sales should be passed to the defendants' credit. They made no provision expressly what was to be done, if, by reason of the proceeds of sales being less than the advances and commission, the latter could not be deducted from the former.

I think, if a case of this kind were shewn, or if it appeared that all the goods the defendants had delivered to the

plaintiffs and Law had been sold and credited to the defendants, and so the transactions between them were closed, and that upon such closing of all accounts and transactions between them, the defendants were indebted to the plaintiffs in divers large sums of money for advances, commission and interest, which exceeded the proceeds of all sales of goods delivered by defendants to plaintiffs and Law, that an action might lie on this covenant as a liability to be implied from the tenor of the agreement.

Upon the closing of the agreement is not equivalent to an averment that the plaintiffs have no goods on hand of the defendants still to be sold. They may have more by far than all their claim; and I do not think an action will lie on this covenant till all these goods have been disposed of, and a balance appears against the defendants in respect of advances, &c., over and above all proceeds of sales.

In *Williams v. Burrell* (1 C. B. 430) Tindal, C. J., said :
“In every case it is a matter of construction to discover what is the sense and meaning of the words employed. In some cases that meaning is more clearly expressed, and therefore more easily discovered; in this it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others it is only made out by the comparison of different and perhaps distinct parts of the same instrument; but after the meaning and intention of the parties is ascertained, after the agreement is once inferred from the words used in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded. The legal effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be a matter of inference and agreement, is precisely the same; and an implied covenant, in the sense of the term, differs nothing in its operation or legal consequences from an express covenant.”

The observations of Lord Denman, C. J., in *Aspdin v.*

Austin, 5 Q. B. 683, 4, are also material for both parties in this case,

It appears to me that all the transactions were to be entered in account between the parties, and that an implied liability existed to account, and therefore to pay, when all the transactions were closed according to the balance, as it then was.

I think the declaration is not now sufficient ; but, amended as suggested, it may, I think, be made sufficient.

By the addition of the common counts, or special counts framed as on a simple contract liability to pay, all question would certainly be avoided.

If the plaintiffs desire to amend they may do so by amending and paying costs in three weeks, otherwise there will be judgment for defendants on demurrer.

Judgment accordingly.

THE RUTHVEN WOOLLEN MANUFACTURING CO. v. THE
GREAT WESTERN RAILWAY CO.

Carriage of goods—Want of notice of necessity for prompt delivery—Breach of contract—Measure of damages.

In an action by plaintiffs against defendants for damages occasioned by the non-delivery of a certain article of machinery contracted to be delivered by them for plaintiffs, it appeared that no notice had been given at the time of the contract to the defendants of the necessity for a prompt delivery of the machinery, nor of the use it was to be put to : *Held*, on the authority of *Cory v. The Thames Iron Works Co.*, L. R. 3 Q. B. 181, re-affirming *Hadley v. Baxendale*, 9 Ex. 341, that the plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from its non-delivery, or the wages of certain workmen employed upon the building in which the machinery was to be used.

THE action was against the defendants as common carriers, the declaration charging, in substance, that the plaintiffs, a manufacturing company, delivered to defendants certain mill gear and machinery, to be carried over their line of

railway from Galt to Windsor, which defendants contracted to do, and assigning, as a breach, the non-delivery of the articles in question, and alleging consequent loss, delay and expense to plaintiffs, &c., &c.

The second plea was that plaintiffs did not deliver, nor did defendants receive, goods for purpose and on terms alleged. Issue.

The plaintiffs claimed loss of machinery...	\$45 43
Freight	3 15
Expenses travelling	12 00
	<hr/>
	\$60 58
Wages.....	\$31 50
3 weeks work, 900 hundred yds.	
at 29½ cts.	265 50
	<hr/>
	297 00
	<hr/>
	\$357 58

The cause was tried at the last Spring Assizes, held at Sandwich, before the Chief Justice of this Court.

The facts were that the machinery was sent by defendants for plaintiffs to Windsor from Galt, on 5th October, 1867. Defendants on 11th October, gave plaintiffs notice of the arrival of the articles at Windsor, when plaintiffs sent for them, but found a shaft was missing, and they would not therefore take the other things. Defendants were told of the missing shaft and promised to attend to the matter as soon as possible. Plaintiffs waited three weeks, then sent a second order for new articles, which arrived on 26th November, and after their arrival defendants recovered the first shaft.

The evidence shewed the plaintiffs had sustained the damage claimed, but the question was whether they were entitled to make defendants pay them, there being no evidence that the defendants knew, when they took the goods to carry, that they were urgently required, or that there would be anything like the amount of damages sustained or claimed that were claimed.

The reason the plaintiffs ordered a new set of all the articles was, that they might be sure to fit, for some articles only, if renewed, might not fit with the former ones.

The jury found a verdict for the plaintiffs for \$60.58, with leave to them to move to increase the sum by such of the other items claimed as the Court might think the plaintiffs entitled to.

K. Mackenzie, Q. C., obtained a rule *nisi* to increase the verdict pursuant to leave reserved.

Irving, Q. C., shewed cause, contending that the sums proposed to be added to the verdict were not properly recoverable, on the evidence, as damages, and citing *Woodger v. Great Western R. W. Co.*, L. R. 2 C. P. 318; *Hadley v. Baxendale*, 9 Exch. 341; *Smeed v. Foord*, 1 E. & E. 602; *Cory v. The Thames R. W. Co.*, L. R. 3 Q. B. 181; *Gee v. Lancashire R. W. Co.*, 6 H. & N. 211; *Boyd v. Fitch*, 14 Ir. C. L. Exch. 43; *Hales v. The London, &c., R. W. Co.*, 4 B. & S. 66; *O'Hanlan v. The Great Western R. W. Co.*, 11 Jur. N. S. 797, 12 L. T. N. S. 490; *Rice v. Baxendale*, 7 H. & N. 96; *Adams v. The Midland R. W. Co.*, 7 H. & N. 1034 (additional cases); *Great Western R. W. Co.*, app. v. *Redmayne*, respt., L. R. 1 C. P. 329; *Ogle v. Vane*, L. R. 3 Q. B. 275; *Davis v. The North Western R. W. Co.*, 4 H. & N. 855 (additional cases).

Mackenzie, contra:—

Profits and charges claimed are recoverable, if defendants must have known that the plaintiffs would have made a profit by the articles of machinery in question: *Waters v. Towers*, 8 Exch. 401; *Dunlop v. Higgins*, 1 H. L. 381; *Borradale v. Brunton*, 8 Taun. 135; *Richardson v. Dunn*, 8 C. B. N. S. 655; *Bell v. Midland R. W. Co.*, 10 C. B. N. S. 287.

A. WILSON., J., delivered the judgment of the Court.

In *Cory v. The Thames Ironworks Co.* (L. R. 3 Q. B. 181), decided this year, the rule of law, for the measure of damages for non-fulfilment of a contract, by non-delivery

of a chattel, is re-affirmed as it is laid down in the principal case of *Hadley v. Baxendale*.

Cockburn, C. J., said : " If the special purpose, from which the larger profit may be obtained, is known to the seller, he may be made responsible to the full extent ; but if the two parties are not *ad idem quoad* the use to which the article is to be applied, then you can only take, as the measure of damages, the profit which would result from the ordinary use of the article for the purpose for which the seller supposed it was bought."

The defendants were held liable to pay the larger amount of damages claimed, because in that case *that* was the loss which was the natural consequence of the non-delivery of the article (a derrick of a special kind); for the seller understood and believed it would be applied to the ordinary purposes to which it was capable of being applied.

In *Woodger v. The Great Western R. W. Co.* (L. R. 2 C. P. 318) a commercial traveller delivered a parcel of samples to defendants to be taken to Liverpool, but did not state the contents or the purpose for which required. By negligence of defendants the parcel was delayed, and the traveller spent three days at Liverpool unemployed waiting for it : *Held*, damage too remote : the hotel expenses were not within the contemplation of the parties.

One of the Judges said : " The jury might, no doubt, include as damages, cab hire or other reasonable expenses, if the plaintiff had to call several times at the Company's office in endeavouring to recover the goods."

In *Hales v. The London, &c., R. W. Co.* (4 B. & S. 66) the carrier of goods is not answerable for damages in consequence of the goods not arriving in time, unless he had notice that time was important ; but the person sending is entitled to have the goods sent within a reasonable time. The loss of the hire of goods for the delayed time was therefore not allowed, but the plaintiff was allowed for " the personal expense which he had been put to in making inquiries for the goods."

Gee v. Lancashire, &c., R. W. Co. (6 H. & N. 211) is also applicable.

There is no use in going over all the cases : they point most clearly to this, that the damages which follow naturally from the breach of contract are alone to be recovered, unless the parties contemplated a different rule, or the one in default knew there was a necessity for promptness of delivery on his part, or that there was a special purpose to which the article was to be applied ; in which case special damages are recoverable.

In this case the property to be carried for the plaintiffs was machinery. No notice was given to the defendants that there was any necessity for urgency in forwarding it, nor of the use it was to be put to. It was such machinery as might have been applied to probably five hundred different uses, from that of the most common and *least paying*, through all the varying gradations, up to the last novelty and the most profitable.

According to what trade, or business, or standard of profit, are the defendants to pay in damages for non-delivery, if they do not know the purpose the articles are to be applied to ?

In the absence of such information being communicated to or known by them, they can only be presumed to have known the machinery was wanted for some purpose, and, it was hoped, a profitable purpose. The common use of that machinery might be covered by a loss of any sum, as low, perhaps, as a shilling a day ; and if the plaintiffs cannot bring their case within the rule allowing special damages, they must be content to take the lower scale as compensation, that which naturally resulted from the breach of contract.

The plaintiffs have recovered, and, by consent of the defendants, for the whole value of the goods which were ordered, the shaft, parcel of them, having been the only part which did not arrive. Whether the plaintiffs have got these goods or any part of them does not clearly appear. If they have, then they are not only paid for them by the verdict, but have them too ; and so as to a part ; if they have not the goods, their recovery may be strictly right as it is.

The amount, as recovered, is not disputed: the larger sum, for alleged loss of profits and wages, is not, I think, on the evidence allowable.

The rule must be discharged.

Rule discharged.

LALOR V. BURROWS ET AL.

Competency of witness—General allegation in declaration—Right to recover specific charges—Excessive damages.

A brother of the plaintiff, having been called as a witness on the latter's behalf, stated, on his *voire dire*, that the plaintiff resided in a foreign country, and that his business was carried on by him in the plaintiff's name, under an arrangement between them, that he was first to get his support out of it, and then hand over the surplus, if any, to the plaintiff. It further appeared that the contract in question in the suit was made by the plaintiff with defendants, and there was no evidence to shew that the witness had brought the action, or given the instructions for the bringing of it, or that he was responsible for the costs of it, or that it had not been solely and directly brought by the plaintiff himself:

Held, that the witness was not incompetent.

Under a general allegation in the declaration, that plaintiff had incurred expense in replacing, altering and repairing certain locks, the subject of the contract, *Held*, that plaintiff could properly claim the cost of the alterations and certain travelling expenses to which he had been put in connection therewith.

The contract price for the locks in question was \$52, whilst the jury gave the plaintiff \$397.50 damages, which were proved to be the expenses to which he had been put by reason of defendants' failure to carry out the contract: *Held*, not excessive.

THE declaration alleged that, in consideration that the plaintiff employed the defendants to make 180 sets of lock castings, of good malleableized iron, at a price to be paid therefor, the defendant promised to make and cast the same of good malleableized iron, and furnish the same in a proper workmanlike manner; and although defendants made the said 180 sets of lock castings under colour of the agreement, and in pretended performance thereof, and the plaintiff paid the defendants for the same; yet the defendants did not cast and make the 180 sets of lock castings

of good malleableized iron, or finish the same in a proper manner, whereby the same were of no use to plaintiff, and he incurred expense in replacing, altering and repairing the same.

Common counts.

Pleas, 1st, to first count, non-assumpsit. 2nd, to first count, defendants did cast and make the 180 sets of lock castings of good malleableized iron, and furnish the same in a proper manner. 3rd, to common counts, never indebted. 4th, to same, set-off.

Issue on first three pleas.

Replication, Never indebted to fourth plea.

Issue.

The plaintiff claimed as follows :

One lathe and screwing machine.....	\$64 00
Cash at three different times.....	56 00
540lb of castings @ 11c. per lb.....	59 40
Grinding same	54 00
Express charges and freight.....	5 00
Putting 144 sets of castings into locks @	
\$1.25 per lock.....	180 00
Replacing same with forged iron.....	144 00
Travelling expenses.....	93 50
Board, wages, in replacing same.....	48 00
36 sets of castings on hand.....	\$11 88
Grinding same	10 80
Express charges and collection...	2 50
Work on same	27 00
150lb hard castings @ 11c. per lb.	16 50
Work on same	12 00
	<hr/>
	80 68
	<hr/>
	\$784 58

The cause was tried at the last Winter Assizes for the County of York, held before Hagarty, J.

At the trial Thomas Lalor, a brother of plaintiff, was examined as a witness for the plaintiff. He was objected

to as being really the beneficial plaintiff, but his evidence was received subject to the objection.

The learned Judge told the jury that if the plaintiff ordered an article of a known character, made in a known way, as when one buys a patent article, if the article be manufactured in a proper usual way, it is not a cause of complaint if it do not suit the purpose for which it was intended; that the plaintiff had determined to use malleable iron for the locks; that he informed the defendants of the purpose for which they were designed, (for the public jails); that if the defendants did not give him a good article reasonably answering the character of malleable iron and a merchantable article, they had to answer for damages naturally and immediately flowing from the breach of contract, and naturally and reasonably in the contemplation of the contracting parties; that if the contract were broken the inquiry was, what it would reasonably take to enable the plaintiff to supply the want of a proper article of that nature; that if good malleable iron castings could have been readily procured, they being cheaper than wrought or forged iron, the difference of expense in substituting one for the other would naturally be the ordinary measure of damages; that no special damage as to any contract which the plaintiff had with any third person was laid; that the bad materials put into the locks had of course to be taken out and good put in, and the cost of that seemed to be a charge to be properly allowable.

The jury found a verdict for the plaintiff and \$397.38 damages.

No objection was made to the charge.

In Hilary Term last *Spencer* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, on the ground that Thomas Lalor was an incompetent witness, he having in effect stated that he had failed in Hamilton; that he was carrying on business in the plaintiff's name, who lived in New York, upon the understanding that the witness was to have a good living out of the business for himself and

family, and if there was anything over the plaintiff should receive it; and also because of the reception of improper evidence of special damage, and in leaving it to the jury to find special damages; such as the charge for trips to Montreal and back, the expense of applying wrought iron bolts &c., in place of those furnished by defendants, as no special damage was laid in the declaration; and on the ground that the special damage was too remote; and because it was not charged as special damage that the plaintiff had a contract with respect to these articles with any other person; and because the damages were excessive, the whole price to be paid to the defendants having been only \$52, and the jury should have been told the damages should be governed by the price the plaintiff was to pay in the absence of fraud; and because it did not appear what sort of iron the plaintiff had contracted to put in the locks of the prisons: that it might have been wrought iron, and the locks might have been rejected on that account; and on the ground of surprise, and on the affidavits filed.

In Easter Term last, *Harrison*, Q. C., shewed cause:—

This kind of malleableized iron, it appeared at the trial, could not be had in Canada, excepting from defendants. The defendants knew also the locks were required for Government gaols and that the plaintiff had the contract to furnish them; there were, therefore, peculiar circumstances which entitled the plaintiff to special damages beyond those which naturally flowed from the mere breach of contract: *Hadley v. Baxendale*, 9 Exch. 341; *Cory v. The Thames Ironworks & Co.* L. R. 3 Q. B. 181; *Wilson v. The Newport Dock Co.*, L. R. 1 Exch. 177; *Gee v. The Lancashire, &c. R. Co.*, 6 H. & N. 220; *Great W. R. Co. app. v. Redmayne*, resp., L. R. 1 C. P. 329.

The charge was therefore quite right as to the damages, and the damages given were such as ought to have been allowed: *Randall v. Raper*, E. Bl. & E. 84; *Dingle v. Hare*, 7 C. B. N. S. 145; *Mullett v. Mason* L. R. 1 C. P. 559;

Knowles v. Nunns, 14 L. T. N. S. 592. There was evidence in this case of a warranty : *Fletcher v. Tayleur*, 17 C. B. 21.

The declaration is sufficient to cover the special damages : *Metropolitan Association v. Petch* 5 C. B. N. S. 504.

Thomas Lalor was a good witness : *Sage v. Robinson*, 3 Exch. 142 ; *Adams v. Toland*, 12 C. P. 119 ; *Hearne v. Turner*, 2 C. B. 535 ; *McMullen v. Murdoff*, 19 U. C. 506 ; *Bonner v. Moderwell* 9 C. P. 504 ; *Johnstone v. Smith*, 10 C. P. 220 ; *Hitchcock v. Cronkite*, 15 U. C. 157 ; *Whyte v. Wycott*, 1 C. P. 320.

He then commented on the affidavits and filed others in answer, and contended that the affidavits of defendants were met by those of plaintiff and should not be allowed to impeach a verdict, when these matters might have been produced before the jury : *Scott v. Scott*, 9 L. T. N. S. 454 ; *Reg. v. McIlroy*, 15 C. P. 116 ; *Reg. v. Hamilton*, 16 C. P. 345.

Freeman, Q. C., contra :—

Thomas Lalor was an incompetent witness : *Vannatto v. Mitchell*, 13 Grant, 665. Special damages are not recoverable on a general declaration like this : 1 *Ch. on Plg.* 7th ed. 348.

M. C. Cameron, Q. C., (on same side), as to damages and their statement, referred to *Gibb v. Gildersleeve*, 26 U. C. 474, and *Clark v. Maynard*, 6 A. & E. 523.

The plaintiff also should have tested the metal supplied by defendants before putting it into the locks : he should not, at any rate, have put it into all the locks, and require the defendants to pay for taking it out of all of them again.

Spencer also appeared for defendants.

A. WILSON, J., delivered the judgment of the Court.

As to the admissibility of Thomas Lalor as a witness.

Interest shall not exclude any person, offered as a witness, from giving evidence ; but the person so offered is not a competent witness, if he is a party to the suit or proceeding, individually named in the record, or any person in whose immediate or individual behalf the action is brought or defended, either wholly or in part.

Thomas Lalor is not a party to the suit individually named in the record. Is he then a person in whose immediate or individual behalf the action is brought or defended ?

The objection to his competency is stated in the rule.

In *Hill v. Kitching* (3 C. B. 299) the witness said he expected, pursuant to arrangement and the custom among brokers, to receive half the amount of the commission the plaintiff might recover in this action : Held, the witness was competent : he could not be made a co-plaintiff, nor was he a person in whose immediate or individual behalf the action was brought, either wholly or in part."

Coltman, J., said, the Statute "distinguishes between parties having an interest in the action and parties in whose immediate and individual behalf the action is brought."

Maule, J., said, "Here Crammond does not employ Hill to bring the action : the plaintiff may decline to pay the witness a moiety of the commission when he has recovered it."

Tindal, C. J., said, "Crammond, though he claims a moiety of the commission under a separate and distinct agreement with the plaintiff, has no right to lay his hand on any portion of the money to be recovered in this action."

In *Sage v. Robinson* (3 Exch. 145) Pollock, C. B., said, "Whenever the witness would under the old law have been rendered competent by a release, he is now competent without one : that I consider a good test." The party had agreed with the defendant to indemnify him against half the costs : he did not instruct the attorney : the defence was conducted by the defendant himself. In *White v. Wycott* (1 C. P. 320) it was held a partner not joined in the action was a good witness for his co-partner. See also *Hitchcock v. Cronkite* (15 U. C. 157) ; *Northern R. Co. v. Patton* (15 C. P. 344.)

In *Johnstone v. Smith* (10 C. P. 220) the plaintiff had obtained a judgment against the maker of a promissory note and brought an action against the Sheriff for a false

return to the *fi. fa.* sued out on the judgment. On the trial of the action against the Sheriff the plaintiff called an indorser to the note as a witness, which was objected to. Draper, C. J., in giving judgment said: "The situation of the witness was this, he was liable to the plaintiff for the same debt which the plaintiff was enforcing payment of by the execution. * * * He had not paid the note, and the suit was not carried on for his benefit. * * * That he had an interest in the plaintiff's obtaining satisfaction from the maker is true, but it does not follow from that that this suit is brought on his immediate or individual behalf: he was a competent witness."

In *Bonner v. Moderwell* (9 C. P. 504) an execution creditor, who indemnified the Sheriff, who was sued in this action, was held an incompetent witness, as he in reality defended the action.

In *McMullin v. Murdoff* (19 U. C. 506) an assignee for the benefit of creditors, who brings the suit in the assignor's name, is admissible as a witness, because he has no beneficial interest in the suit.

In *Wilson v. Magnay* (1 C. & K. 291) the Sheriff's officer, to whom the warrant to arrest on the *ca. sa.* was granted, was held a competent witness for the Sheriff, who was sued for not arresting, though he was bound to indemnify the Sheriff.

In *Senior v. Wheeler* (1 C. & K. 293, note), the same was held again. Wightman, J., said: "This is not for the immediate benefit of the witness, as he could only be made liable through the medium of another action."

In *Taylor on Evidence*, 1 ed. s. 975, treating on the former law under Lord Denman's Act, not noticed now in his later editions, because that ancient and abolished law has no longer effect there, though it is still in full operation here, he says, in speaking of the two cases last mentioned, the bailiffs were good witnesses, "provided they had not actually employed the attorney for the defence; for in such case the witness is not directly liable either for damages or costs"; and in section 976, "perhaps, in cases of this nature

the question on which the competency of a witness mainly turns is, whether he authorized expressly or impliedly the commencement or defence of the action, and whether in point of fact he has rendered himself in any way directly responsible for the costs." That must mean to the attorney, not to the actual party to the action: *Sage v. Robinson* (3 Exch. 142); *Jacobs v. Layborn* (11 M. & W. 685).

As to *Vanatto v. Mitchell* (13 Grant, 665), Robert, a legatee under the will in question, was held to be an incompetent witness in a suit to compel the executors to prove the will and to make good certain losses. It was said the suit was brought for his immediate benefit, with that of others beneficially entitled under the will. If that were so he was rightly excluded; but if he were excluded "because it was his interest to fix the executors with liability, in order to obtain his bequest," as the language imports, then, with all deference to the learned Vice-Chancellor, the conclusion does not seem supported by the authorities; for whenever the witness is not to get the immediate fruit of the action, in which he gives testimony, as his recompense, but must resort to another action for that purpose, he is not a person in whose *immediate* [per Alderson, B., in 3 Exch: 145] or individual behalf the action is brought. There is a difference between the witness having an interest *in the action* and the action *being brought* for his interest: "he had no right to lay his hand on any portion of the money received in that action." *Bonner v. Moderwell* (9 C. P. 504) is perhaps not quite reconcilable with many of the cases; for if the witness, who had indemnified the Sheriff, did not in truth defend that action or employ the attorney, so that the action was not defended in his immediate or individual behalf, he would be a good witness.

If the witness, Thomas Lalor, who managed the whole of the business that was carried on in the plaintiff's name, the plaintiff residing in a foreign country, and if the plaintiff made the contract with the defendants, as he says he did; and if he is firstly to get his support for himself and

family out of the business and then to give the surplus if any to the plaintiff, I should say he was still a competent witness, so long as he had not himself, or on his own responsibility and at his own risk brought the suit. The witness also said : " It does make a difference to me what the result of this suit is. I will be better off if the suit is won : the business will be broken down if the suit is not gained. If it break I must seek some other employment. The business is not mine : it is mine to the extent of getting a living out of it."

Now, this at most was an interest releasable before the Statute, and therefore not a disqualification since the Statute. But if the witness has brought the suit himself at his own expense and risk, then he would be a person in whose immediate or individual behalf the action was brought wholly or in part, according to the cases before cited.

The evidence does not shew, however, that this witness brought the action or gave any instructions for it to be brought, or that he is responsible for costs in any way whatever, or that the action was not brought by the plaintiff himself solely and directly ; and as the exclusion of witnesses should not, I conceive, be favoured in any shape, the objection taken to the admission of the witness cannot prevail.

As to the laying of special damage in the declaration.

The object of stating it is to give notice to the defendant of the nature and extent of the claim made against him, and of the particular facts by which it is to be supported to enable him to meet it at the trial : 1 *Wms. Saund.* 243c. note 5.

Placing timbers opposite plaintiff's house, whereby the access was obstructed, "and divers persons, who would otherwise have come to the house and taken refreshments, were prevented," was held not to be a statement of special damage in the usual sense of the term. If the declaration had alleged that J. S. was prevented from coming to the house, that would have been special damage ; but a state-

ment that *everybody* was prevented is a statement of general damage : *Rose v. Groves* (5 M. & G. 613).

The allegation of a general loss of customers, without naming them, is sufficient in an action of defamation, whereby the plaintiff, an innkeeper, has been prejudiced in his business ; for he cannot know the names of all the customers he may have lost : *Evans v. Harris* (1 H. & N. 251).

Here the averment is that the plaintiff "has incurred expense in replacing, altering and repairing the locks."

The plaintiff's business was carried on in Toronto : the work was to be done at Montreal ; that is, the locks were to be put on the cells of the gaol at Montreal : the defendants carry on business in Hamilton.

I cannot tell what items out of the many composing the \$784.58 claimed the jury allowed to the plaintiff. They gave a verdict for \$397.38. An amount of nearly this sum can be made of the three items, \$180, \$144 and \$93.50, making \$417.50, and deducting from it the \$20 still unpaid by the plaintiff to the defendants will make \$397.50 ; but whether these items constitute the claim I cannot tell : they are, however, of the same character as the rest, and if I assume they do compose the sum given as damages, I shall be doing no injustice to either party.

Travelling expenses have, therefore, probably been allowed to the plaintiff. The defendants assume they have been, and I cannot say they are wrong in doing so : I may assume so too.

The plaintiff supports his right to this allowance, because, he contends, firstly, it was the natural consequence of the defendants' breach of contract. The work was done in Toronto by replacing, altering and repairing the locks : "It could not be done in Montreal : it was cheaper to do it here than to take men down to do it there ; men, who understood the work, could do it quicker and cheaper here with the proper tools." Under the general allegation of replacing, altering and repairing, the expenses of travelling, if necessary, and if still making the cost of the work less than

it would have been, if done in any other manner or at any other place, is claimable properly under the head of replacing, altering and repairing. And secondly, this averment, coupled with the facts known to the defendants and proved at the trial, sufficiently indicated to them that such a claim would be made.

There was in fact no market for such articles in Montreal, so that they could be bought or replaced there. The cost of them there was more than at Toronto, by the expense of getting them there, and the plaintiff's profit, when they were there, beyond the cost price and charges, and the cost of making or replacing them in Montreal, was more than the making of them in Toronto, with the carriage and travelling expenses added. I think the allowance for journeying, under the circumstances, a fair item of charge and that it is sufficiently stated.

O'Hanlan v. The Great Western Railway Company (11 Jur. N. S. 797), *Price v. Baxendale* (7 H. & N. 96), and *Metropolitan Association v. Petch* (5 C. B. N. S. 504), have some bearing on the question. See also *Hales v. The London, &c., R. Co.* (4 B. & S. 66). The claim in question was not too remote, it was the natural and reasonable consequence of the breach of contract.

That the damages were excessive was also argued.

The plaintiff did not, as in 9 Exch. 341 and 6 H. & N. 21, claim for such damages as the stoppage of a mill, because the articles were not supplied in time; nor, as in 1 E. & E. 602, claim for loss by rain, and redrying crops occasioned by delay to supply a threshing machine; nor, as in *Clark v. Maynard* (6 A. & E. 523), for the loss of or profit by a re-sale; but it was for the ordinary charge made to procure the article which the defendants had agreed to furnish and had not furnished, and so had made it necessary for the plaintiff to procure to remedy their default, or, what is the same thing, to make the articles such as the defendants had agreed they should be. It is in fact the difference between the price paid and the market price to replace the goods, which arises so frequently.

In *Randall v. Roper* (E. B. & E. 84) the defendant, who had sold goods with a warranty, was held liable to plaintiff for loss sustained by him on a sale with the like warranty, for the amount he had to pay to his vendees ; and in *Dingle v. Hare* (7 C. B. N. S. 145) the same point was considered but not decided.

But, certainly, on a warranty of articles, if the defendant knew the use the plaintiff intended to put them to, and there was also a breach of warranty, the defendant would be liable for all the loss that followed, as in *Knowles v. Nunns* (14 L. T. N. S. 592).

The like rule prevails, if there be a fraudulent representation made: *Mullett v. Mason* (L. R. 1 C. P. 559).

If the plaintiff be entitled to procure other goods by reason of the defendant's failure of contract, it makes no difference to him how little he paid or was to pay the defendant for them, and how much he had to pay to procure or replace them. The damages the defendant may be liable to pay may be enormously beyond any profit or price he was ever to receive for his work, as in *Wilson v. The Newport Dock Co.* (L. R. 1 Exch. 177) ; and as often happens when a lawyer, who was to get a few dollars for searching a title, has to pay the whole value of the property by reason of some defect which he should have guarded against ; or when a surgeon, who has got a few dollars for his services, is called upon to pay for the loss of a limb, or some other misfortune which his patient has suffered from his alleged neglect, far beyond the trifling sum which was to have been his compensation.

I presume the parties must have considered whether, in this case, the plaintiff adopted the most reasonable course in rectifying the defendants' default, by proceeding as he did, or whether he could not have got a completely new set of articles from the defendants at a lower price than he paid to remedy their insufficiency.

Assuming that this was, as I have no doubt it must have been, fully considered, I see nothing in the character or quantum of damages which have been allowed to the plaintiff to complain of.

Then, as to the case on the affidavits. The substance of the defendants' affidavits is that the plaintiff's contract with the Government was to supply wrought-iron bolts for the locks, and that the locks were condemned by Government, not because the bolts were of malleableized iron, but because they were not of wrought-iron, and that wrought-iron bolts are better and more expensive than the kind the defendants agreed to supply.

Some of the affidavits filed by the defendants shew very strongly that the locks to be supplied by the plaintiff to the Government were to have been manufactured entirely of wrought-iron. Mr. Arnoldi, who made the report on the pattern locks, submitted by the plaintiff for approval, states this in his report which is annexed to his affidavit, and the statement made by Mr. Meredith, the Chairman of Prison Inspectors, as set out in Mr. Kindall's affidavit, shews the locks were condemned by Government because the bolts and tumblers were not of wrought-iron as they should have been ; and the affidavit of Mr. Burrows states he was surprised by the denial of these matters on the trial by plaintiff's witnesses, and also by the assertion of Thomas Lalor before the jury that malleableized iron was as strong and good as wrought-iron for the purpose.

I do not know what "the castings being defective" means in the plaintiff's letter of the 14th of March, 1867, nor what he means by fearing "he has got himself into a fix in consequence;" whether the defendants mean to say that this letter shews the defects are all attributable to the plaintiff himself, or how else. Mr. Arnoldi, Mr. Collins, Mr. McBeth, and Burrows, the defendant, swear as to the unfitness of malleableized iron for the locks required, and of its great inferiority in strength and price to wrought-iron. None of these witnesses were at the trial. Matthew Goggins also makes an affidavit, but he was at the trial.

The plaintiff has filed the affidavits, in answer, of Bartholomew Lalor, Thomas Lalor, James Vyse and William Burke, who were all witnesses examined for the plaintiff at the trial.

W. Burke declares that malleable cast-iron is nearly altogether used for bolts, hinges and other parts of the best locks that are made as well for gaols as for burglar proof safes and the like : they are stronger and better than if made of wrought-iron, and less liable to get out of repair.

Vyse states the same, and that he tested the quality of the iron furnished by defendants, and it was far inferior to good malleable cast-iron. So also does W. Lalor ; and Thomas Lalor's affidavit is very full, supporting the plaintiff's case in every particular.

New trials are not very feely granted on affidavits shewing facts known to parties at the trial : *Adams v. Toland* (12 C. P. 119) ; *Scott v. Scott* (3 Sw. & T. 320).

The defendants' letter of the 28th of March, 1867, admits the bolts " were not so good as they might have been : we are perfectly well aware of that ; but they are a great deal better than cast-iron, * * and are willing to make you an allowance for them." It is quite clear then the defendants failed in their contract.

The bolts supplied, being deficient, had therefore to be taken out of the locks, and other bolts replaced in their stead. Now, the difference between putting in good malleable cast-iron and wrought-iron, so long as all the locks had to be taken to pieces and refixed, would probably not be such a difference as we should be disposed to grant a new trial for.

If it had not been for the letter of the defendants we would probably have granted a new trial, for there is much reason to contend that the plaintiff's contract was to supply locks of wrought-iron material to the Government, and that the condemnation was because the locks were not all wrought-iron. Still, this matter was known to the defendants before the trial, and they should have been prepared to meet it by counter evidence, and the plaintiff by the defendants' own letter has a claim against them for some damages, and I am not able to see they would be very much less than the jury have given.

Upon the whole, then, I think it better not to interfere

on this latter ground, although the plaintiff's case is not satisfactory in some respects.

Rule discharged.

HARKLEY V. THE PROVINCIAL INSURANCE CO.

Marine insurance—Total loss—Evidence—Notice of abandonment—New trial.

In marine insurance notice of abandonment is indispensably necessary in all cases where the insured elects to abandon.

In this case the vessel insured ran upon the rocks on the 11th October, and the defendants' agent was informed of it by the insured on the 16th October, but he was not informed of his abandonment as for a total loss until he made the protest before the agent on the 17th October, and no formal abandonment in writing, under the terms of the policy, was made until 27th December following, when the vessel had been floated off and utterly lost by the carelessness of the insured: *Held*, that the notice was too late to be available, even if there had been such a loss as would have entitled the insured to abandon.

Whether a loss is to be considered a total loss depends on the fact whether the vessel, as injured, is useless to the owner unless at an expense that no prudent man, if uninsured, would incur, an expense exceeding the value of the ship when repaired. In this case it appeared that on the ninth day after the vessel went upon the rocks, the captain, on returning to her, found her in as good a state as on the second day, and that she remained between two and three weeks on the rocks and then floated two or three miles below. It further appeared that there was not the slightest attempt made to get her off or recover her, or even to examine her, while all the witnesses said they would have tried to get her off, and it seemed beyond doubt that there were eight days during which from the calm state of the weather an attempt could have been successfully made, for within three days after she first ran on she floated again without any assistance, and there was evidence that even one man could have hauled her off, but the captain, a witness stated, intimated to him that he did not mean to do anything with the vessel:

Held, that the evidence wholly disproved a total loss, either actual or constructive.

Held, also, that the fact of the plaintiff not having made any exertion to get the vessel off was no ground for a new trial, as, if the vessel got on the rocks by perils of the sea and was injured, plaintiff was entitled to be indemnified for that; but that he was not obliged to take her off, but might leave her on the rocks until she went to pieces, though he could not recover for the destruction thus voluntarily suffered.

Action on a marine policy, dated 30th May, 1866, for insurance to the extent of \$3,334, on the schooner "Ann Harkley" classed B. 1, wherever she was in safety on 1st

June, till the 30th of November following, against the adventures and perils of the lakes, rivers, canals, fires and jettisons that should happen to the vessel: averment of total loss by wreck on lake Huron, a peril insured against.

Pleas.

1. *Non est factum*.

2. Schooner not lost as alleged.

3. Schooner at the commencement of the risk and the commencement of the trip or voyage, on which she was alleged to have been lost, was not seaworthy for such trip or voyage.

4. The perils and losses to the schooner and the loss arose from and were caused by and from the incompetency of the master or captain, the insufficiency of the crew and the unseaworthiness of the schooner, or by and from some of such causes, [the policy providing against such excepted cases.]

5. Plaintiff did not give prompt notice of loss, nor of plan adopted for recovering and saving the schooner, nor did he labor, travel for or make reasonable exertions in or about the defence, safeguard or recovery of the schooner, [the policy providing therefor.]

6. That the loss sued for was for an abandonment, and was not in the manner required by the policy, nor did it convey or vest in defendants an unincumbered and perfect title to the schooner, if accepted by them, as required by the policy, nor did they accept the same, [the policy providing that plaintiff should have no right to abandon unless the loss exceeded \$2500, nor even then unless it was in writing signed by plaintiff and delivered to defendants, nor unless it should be efficient, if accepted by defendants, to convey to and vest in them an unincumbered and perfect title thereto.]

7. That a partial loss not amounting to seven per cent. of the value of schooner was not to be paid for by defendants: averment that the loss was partial and not seven per cent.

Issue.

The cause was tried at the last Spring Assizes held at Owen Sound before J. Wilson, J.

The following facts appeared :

Duncan McLean said : "The schooner was on her way from Windsor to Owen Sound with a ballast cargo of whiskey and coal oil, about the end of September or beginning of October. The vessel was in sight of the Fishing Islands. There was a head wind and heavy sea. The vessel was put back to Saugeen for shelter. About dark, when the vessel was inside the island and in the harbor, she grounded. She was proceeding, and she was scuttled, and then lay quiet. She was got off and repaired in two places where chafed. Cargo was unloaded. In starting from Windsor Captain Harkley, John McDuff, the mate, Henry Hethrington, Thomas Kennedy, and Duncan McLean were on board as officers and crew. At Saugeen three extra hands were taken on in case of a leak. The vessel sailed from Saugeen early in the morning and got to Cove Island on the night of the next day. A few minutes before 8, P. M., she was in sight of the lighthouse on Cove island. At four they were outside the bay, going to Cove Island. The wind was N.E. or E. by N. The vessel ran on a rock north of Cove Island on the N. E. corner as she came round. The captain was steering. He told the mate to keep a sharp look out. The mate said there was water enough on the rock, and to clear the shoal : the captain said he would rather take a few short turns and avoid the rock : the night was dark : it was half-a-mile from the lighthouse where we ran on : the water is deep close up to the rock : they calculated they would clear the rocks and shoal and get through. She got on the rocks amidships and became bent : her back was broken : her keel broken : her hull stove in : the kelson broken inside : the stern post was wrecked too : the rock came through her middle like a post. Next morning she was in a bad state, not worth taking off. All the crew were sailors and worked. The captain is a good sailor. The cargo was taken out, put on shore, and everything else they could

take out, and they abandoned her. The Tuesday or Wednesday of the next week the cargo was brought down. The vessel was still on the rock, but more wrecked. The vessel had one anchor and a kedge or small anchor. The large anchor was sufficient to hold her. There was a heavy sea rolling the night the vessel went on the rock. The captain was not then drunk or the worse of liquor."

In cross-examination he said: "The vessel was injured at Saugeen about midships on one side: planks were chafed: the holes, by which she was scuttled, were filled up, and she was pumped dry before leaving. On sailing from Saugeen, the vessel, on making canvas, struck on some boulders on the opposite side of the pier: her stern went on: not injured there: worked four or five hours to get her off, and hove her off at 10 or 11, P.M.; lay there till morning, then started with a fair wind. The wind changed at 10 or 11, P.M., after starting, just as the vessel was abreast of the Fishing Islands. In the morning they were nine or ten miles west of Cove Island, a sea rolling, but not much wind: did not require the pumps near half the time to keep her dry. McDuff, the mate, charged the captain with steering the vessel on the rock: this was just after she ran on. She went on on a Thursday night, and the witness stayed by her till the Sunday after: the vessel had three masts."

On re-examination he said: "The crew was sufficient for the vessel: it was understood the mate was on the look-out: vessel close hauled. McDuff was not on the watch, as witness understood: it was, a few minutes before she struck the mate and captain began to wrangle: the mate said to the captain, 'see what you are doing': if McDuff had been on the look-out, they would have been safe: he came from the forecandle a few minutes before she struck: tried to swing her off by the head sail."

John W. Slocum gave evidence to the same effect: "When the vessel first went on some of the sails kept up to try to get her off. She had left the rock before witness left the Island. She was bent—hogged—a total loss. The

sea washed her off the rock in a storm. She did not go on the rock from unseaworthiness : no effort made to get vessel off : witness was at Island three weeks." He also said : " Harkley, McLean, Tyler and the witness at six o'clock went on watch, the captain steering. She went on the rock about twenty minutes before eight, P. M. I told McDuff and the men in the fore-castle we were running on shore. When I called McDuff out of the fore-castle he told the captain to put her head about. We tried, but we were too close and just went on. McDuff came swearing out of the fore-castle, and said the captain was running the vessel on the rock."

Several witnesses spoke of her back having been broken, and that she was not worth repairing.

Richard Hill said : " There is no difficulty in navigating at the place where she was wrecked. The channel is three miles wide. The rock is close to the light. The light is good, There is no necessity of working close to the rock. The water is over 200 feet deep outside of the rock. The rock is above water. It is fifteen feet wide and seventy-five or eighty feet long above water. Would have tried to get her off. If her back was broke, not worth while getting her off. Vessel not changed on ninth day when captain came back and took the whiskey, coal oil, and some of the rigging away. The vessel after that floated two or three miles below. She was thirteen or fourteen days on the rock. At the end of nine days she was as good as the second day. With a tug she could have been got off : not worth much with the back broken."

Two or three witnesses said the current at the Island, if the vessel was abreast of the Island, might lead her on to the rock.

Alex. McFee rebuilt this vessel in 1865. Has seen a vessel that was hogged put right. " If a vessel went on a rock I would try to get her off."

W. A. Stevens, the defendants' agent, said : " The plaintiff at Saugeen proposed to abandon the vessel, but there was so little injury done that it could not be understood (sic)

he did not mean to do anything with the vessel after she went on. Don't think he said he abandoned the vessel till the protest was made : no formal notice of abandonment till about the 27th December : did not communicate to defendants that vessel had been abandoned till I sent the abandonment : I had no power to accept an abandonment. Plaintiff told me of the wreck on the 16th October. I wrote the Company telling them the plaintiff had reported the wreck of the previous Thursday. He made protest before me, dated the 17th October. I sent it to defendants on 24th October : on 28th December I sent them notice of abandonment."

Evidence was given that defendants offered plaintiff \$1500 and he agreed to take it, and that afterwards defendants would only give \$1000."

For the defence, A. McNab, a pilot, said he would have tried to have got this vessel off.

Wm. J. Johnson, who owned and sailed a vessel, said the back of the vessel was strained, but not broken. He thought she could be got off and he offered to assist : would have tried to take her off on the night she went on : no reason for her being on the rock : the night was dark and clear : a little haze : the captain's place is not at the helm.

John McDuff, the mate, said : " The vessel was not seaworthy when she left [did not say left *what place* : it must have been either Windsor or Saugeen]. I had been down in the forecastle some time when Slocum came and said the vessel was going on shore. She was then 200 yards to the west of the light house. I ran to the forward sheets to put her about ; then ran aft and asked the captain to keep clear of the point : there was plenty of room : he told me to mind my own business and go away. I went down the forecastle and Slocum came again and told me the vessel was going ashore : she was close to the rock, and I ran aft and told the captain to luff her up close to the wind, and if he had she would have cleared the rock ; but he did not : he cursed and swore he could handle the vessel as well as I could, and to go out of that. She went

on the rock, because she was steered there. It was a nice night, with a nice sailing breeze. She could have been taken off with the anchor and derrick. There was a whole week we could have got her off. There were men enough on the Island to assist in taking her off, if they were paid. She went on the rock, because she was badly handled. Had taken standing rigging off at captain's request, and sent it to Owen Sound: nearly two weeks on the rock."

McDuff's credibility was impeached by several witnesses.

James Dick said the back of the vessel did not appear broken when he saw the remains of it at Rabbit Island in May, 1867.

The evidence shewed the rock was only fifty or sixty yards from the light-house on the Island.

The Judge left it to the jury to say, whether the vessel was lost by the perils insured against, whether reasonable exertions were made to get her off, and whether she could have been got off.

This last question was objected to by the plaintiff's counsel, because there was no plea raising it.

The defendant's counsel contended the declaration was framed as for an actual loss, while the evidence shewed the loss was constructive only; that no notice of abandonment was given in time; that vessel was not seaworthy, not having two anchors; that the assignment of the vessel was not according to the Statute, and no constructive loss was within the policy.

Leave was reserved to the defendants to move on these points.

The jury found for the plaintiff, and \$2926 damages.

In Easter Term last *John Duggan*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered, because,

1. No due notice of abandonment was given in time, though a constructive loss was attempted to be proved.

2. No actual loss, but a constructive loss only (if any) was proved.

3. The vessel was unseaworthy, having only one anchor, and not sufficiently manned, and therefore not lost by the perils insured against, and no total loss of the vessel proved in fact.

4. The bill of sale on abandonment, if given in time, did not contain a recital of a certificate of registry of ownership, as required by the Statute, nor was it sufficient to vest the entire property in the vessel in the assured.

Or, why a new trial should not be granted on the above grounds, and on the ground of the verdict being contrary to law, evidence, and the direction of the learned Judge, who tried the cause ; and because no steps were taken by the plaintiff to get the vessel off, and no exertions were made to save her according to the conditions of the policy, and according to law.

Harrison, Q. C., shewed cause :—

The policy is a time policy, ending 30th November : the loss was on 11th October. The loss was not wilful or intentional, for the plaintiff had a cargo of wheat at Owen Sound, for which his freight would have been \$1,000, if he could have got there ; and the plaintiff's wife and family were also on board that trip. If the back of the vessel were broken she was not worth getting off.

A total loss is when the cost of repairing would exceed the worth of the vessel. The declaration states the loss sufficiently : *Gardiner v. Croasdale*, 2 Bur. 904 ; *King v. Walker*, 2 H. & C. 384, 395, 11 Jur. N.S. 43, 3 H. & C. 209 ; *Hamilton v. The Montreal Assurance Company*, 23 U. C. 37.

A notice of abandonment was not necessary : *Young v. Turing*, 2 M. & G. 593 ; *Roux v. Salvador*, 3 B.N. C. 279 ; *Moss v. Smith*, 9 C. B. 94 ; *Irving v. Manning*, 2 C. B. 784 ; *DeCuadra v. Swann*, 16 C. B., N. S. 772 ; *Kemp v. Halliday*, L. R. 1 Q. B. 520.

If this were an actual loss, no notice of abandonment was required : *Cambridge v. Anderton*, 2 B. & C. 691 ; *Hunter v. Parker*, 7 M. & W. 322 ; *Crawford v. St. Lawrence Insurance Company*, 8 U. C. 135 ; *Farnsworth v.*

Hyde, 18 C. B., N. S. 835, 15 L. T. N. S. 395; *Marshall* on Insurance, last edition, 450 and note.

If notice were required a sufficient notice was given. It is said the transfer was not sufficient in form to pass the property in the ship, by reason of its non-compliance with the Ship Registry requirements.

The letters put in all show sufficient notice: *King v. Walker*, 33 L. J. Exch. 325, 2 H. & C. 384.

In time policies there is no implied warranty of vessel being seaworthy: *Michael v. Tredwin*, 17 C. B. 551; *Gibson v. Small*, 4 H. L. 353.

There is no law that a vessel is unseaworthy because she had only one anchor.

The vessel was sufficiently manned; but even if it had been otherwise, it was of no consequence, so long as the loss was not occasioned by that cause: *Dixon v. Sadler*, 5 M. & W. 405; *Biccard v. Shepherd*, 14 Moore's P. C. 494; *Walker v. Maitland*, 5 B. & A. 171; *Bishop v. Pentland*, 7 B. & C. 219; *Shore v. Bentall*, 7 B. & C. 798, note; *Phillips v. Whitehead*, 2 B. & Ad. 380; *Heyman v. Parish*, 2 Camp. 149; *Bush v. The Royal Exch. Assurance Company*, 2 B. & A. 73.

As to the alleged insufficiency of the transfer for non-compliance with the Registry Act, the vessel was not shewn to have been a registered ship. The certificate could not therefore be recited; but whether registered or not the transfer was sufficient: *Smith v. Jones*, 5 C. P. 425; *Smith v. Brown*, 14 U. C. 1.

As to new trial, the evidence supports the finding: *Davis v. St. Lawrence Inland Marine Assurance Company*, 3 U. C. 18.

It was contended the plaintiff took no steps to get the vessel off the rock or to save her. The jury found the plaintiff did all he could do; but, if he did not, it is no bar to the action by this policy, though the defendant has pleaded as if it were so. By the policy the defendants are merely allowed to interpose and repair the vessel.

J. H. Cameron, Q. C., contra:—

The question of total loss should have been left to the jury, but it was reserved for the Court.

So long as the ship exists in specie there must be an act of abandonment to make it a total loss. It was not the concussion on the rock on the night of the wreck, but the leaving the ship there for three weeks, which made her unfit to be repaired. A clear notice of abandonment should have been given : *Marshall* on Insurance, 599, 601. No such notice was given till the 28th December, while the loss was on the 11th of October. The plaintiff did not rely on an abandonment, because of the want of a timely and reasonable notice.

There was no proper transfer made of the vessel to the defendants : the one that was made in February, 1867, was too late.

The plaintiff cannot recover for more than a partial loss. The seaworthiness should have been alleged in the declaration, because it is in the contracting part of the policy : there is a plea however denying it. It is clear the vessel was not seaworthy at the time she went on the rock. She had been seriously damaged before that on the same trip, and had to ship additional hands to work and pump her. There was nothing to shew the vessel could not be repaired when she first went on the rock. She was lost through mismanagement. The questions that should have been left to the jury were not left to them.

Freeman, Q. C., (on same side) :—

It was conceded at the trial there was not an actual total loss, but at most a constructive loss only. The notice of abandonment was held insufficient at the trial, because not given in proper time.

The only question left to the jury was whether the vessel was run on the rock willfully or not, and this was by agreement. See the pleadings in *Meagher v. The Home Insurance Company*, 10 C. P. 313.

The declaration does not allege an abandonment, and the defendants therefore thought the plaintiff was going for an actual total loss. The precedents make no distinction

between the two cases ; but how can the defendants raise the question unless they are informed for what it is the plaintiff is proceeding : *Arnould on Insurance*, 1164, 5 ; *King v. Western Assurance Company*, 7 C. P. 300.

Duggan, Q. C. (on same side) cited *Meagher v. The Aetna Insurance Company*, 20 U. C. 624 ; *Arnould on Insurance*, 1093 to 1098, 1052.

A. WILSON, J., delivered the judgment of the Court.

There appears to be no necessity, in pleading, to specify whether the plaintiff proceeds for an actual or a constructive loss, and it has long been settled that, on a total loss alleged, a partial loss may be recovered for, because total or partial is not the ground of action : it is the estimate of damages merely.

It is important to determine at the outset what the character of the loss was : whether a total actual loss, a total constructive loss, or a partial loss. It would be waste of time to refer to more authorities on this part of the case than will put the law in a clear light.

In *Knight v. Faith* (15 Q. B. 649, 659 and the following pages) it appears from the cases cited that, "in all cases when the subject is not actually annihilated, the assured is entitled to claim, and claiming as a total loss he must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it. * * * A notion has been entertained in the professsion since *Cambridge v. Anderton* (2 B. & C. 691), that whenever a ship became unnavigable and could not prudently be repaired, the assured might recover for a total loss without notice of abandonment ; but this met with no countenance in 2 H. L. 159. Where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for the pursuing of the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss.

If a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will never be successfully accomplished, a party insured may for his own benefit, as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured ; but if he elect to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of indemnity requires that he shall make a cession of all his right to the recovery of it, that the underwriter may be entitled to all the benefit of what may still be of any virtue, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value."

These are quotations which Lord Campbell makes from the judgments of the Court of Exchequer Chamber in *Roux v. Salvador* (3 B. N. C. 281), of Tindal, C. J. in *Benson v. Chapman* (6 M. & G. 792), and of Lord Cottenham in *Stewart v. Greenock Marine Ins. Co.* (2 H. L. 159) ; and his own opinion on the facts before him was : " Here then we have a ship rendered unnavigable by perils of the sea, not capable of being repaired in the harbor into which she was carried, but still retaining her character as a ship, without the title of the assured, the original owners, being properly transferred to a purchaser. This, we think, is not an actual total loss, and if a constructive total loss, the insurers can only be held liable for the sum insured by a notice of abandonment."

Notice of abandonment is indisputably necessary by law in all cases where the assured elects to abandon. Whether a loss is to be considered a total loss depends on the fact whether the vessel, as injured, is useless to the owner unless at an expense that no prudent man, if uninsured, would incur, an expense exceeding the value of the ship when repaired. In such a case that is to all intents and purposes a total loss : *Irving v. Manning* (2 C. B. 784, in Error.)

Where the thing subsists in specie and there is a chance of recovery, in order to make it a total loss there must be an abandonment : *Tunno v. Edwards* (12 East 488.)

An abandonment must operate not only as a transfer of

the whole interest of the assured on the subject of insurance, but it must be such as to effect that transfer absolutely and unconditionally : 2 *Arnould* on Ins. 2nd ed. sec. 407. See various instances of actual and constructive loss stated in *Moss v. Smith* (9 C. B. 102, &c.)

In *Bell v. Nixon* (Holts N. P. 423) a vessel was driven into port, where there was no dock to receive her. It appeared she had suffered so much by perils of the sea that on survey it was judged expedient to break her up and sell the timber : *Held*, the assured was bound to abandon her before he could call on the underwriters for a total loss, the ship not being a wreck, but, however maimed and damaged, existing in specie as a ship.

Dallas, C. J., said : " If the case be doubtful, the assured ought not to take upon himself to determine for the underwriters to break up the ship and to call on them for a total loss : he should have communicated to them the state of the vessel : she was not a wreck : her timbers were together : she existed as a ship specifically : if her planks and apparel had been scattered in the sea, it would have been another question."

What would otherwise be a constructive total loss will be held to be an actual total loss, when the subject of loss has been sold; and no notice of abandonment will be required, for the property by sale has passed, and there is nothing abandoned to the insurers : *Farnworth v. Hyde* (18 C. B. N. S. 835, and see sec. 8, C. in Exch ; 12 Jur. N. S. 997.)

The vessel got on the rock on Thursday night, about eight o'clock, the 11th of October, 1866. McLean said : " On the Tuesday or Wednesday after, the vessel was still on the rock, but more wrecked."

Slocum said the vessel went off the rocks within three weeks after getting on.

Hill said : " The vessel was thirteen or fourteen days on the rock and then floated two or three miles below. The captain came back to her on the ninth day after her loss : she was as good then as on the second day."

McDuff said the vessel was nearly two weeks on the rock.

David McBeth, the lighthouse keeper at Cove Island, who was examined under commission, and whose evidence is not stated before, said, "The vessel floated off in a gale ten or eleven days after she went on: broke her fastenings: drifted to 'The Shingles,' a shoal eight miles off: lay there two or three days and then floated somewhere else: have seen her hull since at 'Rabbit Island.'" He also said he saw the vessel afloat before she went off, two or three days after she first got on the rock, and he told the mate and the men of it.

James Dick saw her hull in May, 1867, at Rabbit Island.

Was this vessel then an *actual* total loss? I think it would be against the whole evidence and the plain rules of law to say so.

Can it be said then that she was a *constructive* total loss? McLean said, "She became bent: her back was broken: her keel broken: her hull stove in: the kelson broken inside: the stern post was wrecked, too: the rock came through her middle like a post: she was not worth taking off."

Slocum said, "She was bent, hogged, a total loss."

W. Dowkes said, there was a hole in her bottom and her keel was broken: on the 19th October when he saw her considered her back broken.

A. McFee had seen a hogged vessel put right: it must go into dock or be drawn on shore.

J. Monck said he saw the vessel on the rock: she was bent some, and the planks seemed sprung.

W. J. Johnston should say the back was not broken but strained: he saw her on the rock.

James Dick saw the hull on Rabbit Island in May, 1867: her back did not appear to be broken then.

David McBeth said the hull in his opinion was eight days after uninjured any more than when she first got on the rock: the water in the hold was black: if there had been a large leak the water would have been clear: while on the rock she appeared to have her back broken: only a

slight appearance of her back being broken : when she came off she righted : no appearance of her back being broken when she came off : within three hours after floating off the rock she sank down to the deck.

On this evidence, without a survey of any kind, how can it be said there was a total loss constructively ? There was no impossibility to hold a survey. Not a witness says there was the slightest attempt made to get her off or recover her, or even to examine her ; while every witness, who was asked, said he would have tried to get her off, and there was unquestionably a period of at least eight days when the attempt could have been made, for the weather and water were calm. Johnston offered to assist in getting her off, and there were plenty of men on the island to help. That she could have been got off is quite evident, for in two or three days after she got on the rock she got afloat again without assistance at all.

McBeth said : " She could have been taken off on the third day when she was afloat : one man could take her off by a line from the shore to the windlass : she could have been got off easily all the time till she went off herself : in fact she was badly used by no person looking after her. I told the mate, and told him to take a line from the windlass to the shore and haul her off."

So serious a question as this should not be left to the statements of two or three common sailors, to determine whether she was a total loss or not.

The evidence also shewed the vessel had at one time been a propeller and was hogged then, and also when she was rebuilt in 1866, when she was converted into a sailing vessel.

The captain, as Mr. Stephens stated, gave him to understand he did not mean to do anything with the vessel from the time of her going on the rock. The standing rigging was taken off at his request and sent to Owen Sound.

An Insurance Company is entitled to be protected against unnecessary loss, reckless improvidence and imposition. Every loss is not a total loss, and the clearest and most

satisfactory evidence should be given before a total loss is cast upon the insurers.

Everything was wanting here to shew a total loss in any form. The learned Judge should have ruled there was not a total loss proved, but rather the contrary, for there is very strong, if not conclusive, evidence against the plaintiff.

Assuming, however, there was a case for the jury on this point, the next question is, was there a proper notice of abandonment given?

The loss was on Thursday, the 11th of October. The plaintiff told Stephens of it on the 16th, as well as I can make out: he did not tell Stephens of his *abandoning it* until he made the protest before Stephens on the 17th of October, and Stephens said no formal abandonment was made by plaintiff till the 27th of December; that he had no authority to receive it, and he never communicated it to the defendant till he got the formal notice of the 27th of December. This notice in December is entirely too late: it was then quite useless, for the vessel had floated off and been utterly lost by the carelessness of the plaintiff.

The protest of the 17th of October, the only formal document executed by the plaintiff and sent to the defendants before the protest of December, gave no intimation of an abandonment, or of a total loss.

The mere verbal mention of it to Stephens, who was not authorized to receive it and did not communicate it to the defendants, is not a notice to the defendants, and especially when the policy requires that no abandonment shall be valid unless the notice to that effect "is in writing, signed by the insured and delivered to the Company or their authorized agent; nor unless it shall be sufficient, if accepted, to convey to and invest in the Company an unincumbered and perfect title to the subject abandoned."

I am of opinion, then, that, even if there had been a constructive total loss, it was not available to the defendant, from the want of a formal and a timely notice to that effect: *Hunt v. The Royal Exchange Ass. Co.* (5 M. & S. 47); *King v. Walker* (2 H. & C. 384, 11 Jur. N. S. 43.)

The plaintiff's case, therefore, is one of partial loss only.

A nonsuit cannot be entered, because none of the grounds mentioned in the rule are sufficient to exclude a recovery for partial loss.

The defendants, however, apply for a new trial, because the verdict was contrary to law and evidence and the Judge's charge, and because the plaintiff made no exertion to get the vessel off or to save her.

The last ground is no cause for a new trial. If the vessel got on the rock by perils of the sea and was injured, the plaintiff is entitled to be indemnified against that loss: he was not obliged to get her off: he might have left her there until she went to pieces if he liked; but that is no reason why the defendants should not pay for the loss he had in fact sustained by getting on the rock by perils of the sea. He can have no claim for more than that: the rest is his own voluntary loss.

Then what is there against law and evidence? There is nothing against the charge that I know of, for the charge is not given.

The matters for re-trial on the issues are the second plea as to the loss, though under that I conceive no question can arise as to the plaintiff's misconduct, for the loss happened [sea-worthiness apart] from the perils of the sea in fact, though superinduced, it may be, by the plaintiff's misconduct. The plaintiff being owner as well as master will probably be found to make the plea good in *Saddler v. Dixon* (5 M. & W. 405), which was, for the reason there given, held bad. Misconduct must be pleaded, and barratry also: *Heyman v. Parish* (2 Camp. 149); *Thompson v. Hopper* (5 E. B. & E. 1038). The rule would be different on a bill of lading: *Grill v. The General Iron Screw Collier Co.* (L. R. 1 C. P. 600).

The third plea also generally.

The fourth plea, also, because there is evidence from which the jury might infer his incompetence, and the insufficiency of the crew; and unseaworthiness is covered by the third plea.

The fifth plea, as to notice of loss, I think, fails. Due notice seemed to be proved. The loss was on the night of the 11th of October at an out-of-the-way island, and notice by letter was sent to the defendants on the 16th, which seems under the facts to have been prompt notice. The rest of that plea is of no consequence, if the trial be as to a partial loss only.

The sixth plea the defendants are entitled to succeed upon, and

The seventh plea must of course be tried.

What the meaning of the sixth plea is it is not necessary to determine. It is not quite clear what precise instrument should be executed, if any, or whether the effect of notice of abandonment does not of itself vest the title of the insured in the insurer. There was a similar provision in *Meagher v. The Union Ins. Co.* (10 C. P. 313); *Roux v. Salvador* (3 B. N. C. 281-2); *Davidson v. Case* (2 B. & B. 379).

I have made no allusion to the strong suspicion which the facts give rise to against the plaintiff, who was at the helm when the vessel went on the rock, and, as I understand the evidence, in the clear calm night, at a place where there was no necessity for him to be, and from some other circumstances, as the cause has to be tried again.

The facts, if true, constitute barratry in the master; but less than that will, I think, defeat the recovery on the policy, when the master is the owner also.

The rule should, I think, be made absolute for a new trial without costs.

Rule absolute for new trial, without costs.

HAYMAN V. HEWARD.

Parent and child—Liability of parent for child's indebtedness.

Plaintiff, upon their order, furnished to several of defendant's sons, who were at the time living with their father, certain articles of wearing apparel, charging the same to defendant, and delivering them at his house. Previously to this defendant had caused to be inserted once, in one of the daily papers published in the place and taken in by the person by whom plaintiff was employed, a notice to the effect that he would not be responsible for any debt contracted in his name from that date without his written order, but after the goods in question had been furnished to his sons he wrote to the plaintiff, stating that he would not in any way be responsible for any debt incurred by any of his sons *from and after that date* unless under his written order:

Held, that in the absence of evidence repelling the presumption of defendant's authority to his sons to contract the liability in his name, the fact of the delivery of the articles at defendant's house for his sons and the language of his letter to plaintiff were quite sufficient to justify the jury in finding defendant liable, and that it was not necessary to go further and prove the infancy of the sons.

This was an appeal from the County Court of the County of York.

The declaration was on the common counts for goods bargained and sold, goods sold and delivered, work and materials, &c.

The defendant pleaded never indebted, upon which issue was joined.

It appeared from the evidence that the defendant's three sons, who were at the time residing with him, went to the shop of the plaintiff on several different occasions and ordered articles of clothing there on the defendant's account, and that the articles in question were sent to the defendant's house for his sons. Before this, it was proved, the defendant had notified the public through the columns of a daily paper published in the place where he resided that he would not be responsible for any debt contracted in his name from and after that date without his written order, and that two copies of the paper containing this notice had been taken to the establishment in which plaintiff at the time of this action carried on business, and one of them handed to the then proprietor, who was also a subscriber to the paper,

and another to some one else there. There was no evidence that a copy of the paper had been sent to the plaintiff, but he was then in the establishment and subsequently succeeded to the business. Some months after the goods in question had been ordered the defendant wrote to the plaintiff informing him that he would not in any way be responsible for any debt incurred by any of his sons from and after that date unless under his written order, stating that he wished him to consider the communication confidential. There was, also, evidence that the defendant had been called upon by some one in plaintiff's name for a settlement of the accounts rendered for the goods, and that defendant had told him he was then too busy to see him, and that he must call again, and that no objection was then made to the accounts.

At the close of this evidence defendant's counsel moved for a nonsuit, on the ground that there was no evidence to go to the jury; that all the goods had been supplied to the sons and the contract was with them; that there was no evidence under the Statute of Frauds that he undertook to pay the debt, and that orders given by the sons were not his, they not being his agents.

The motion for a nonsuit was overruled, and the case went to the jury, who returned a verdict for the plaintiff for the full amount claimed.

In the following County Court Term the defendant moved and obtained a rule *nisi* for a new trial, which the learned Judge made absolute, on the ground that there should have been evidence of the sons of defendant being infants, and that there was nondirection in omitting to mention to the jury the absence of such evidence.

From this judgment the plaintiff appealed.

McBride, for the appeal, cited *Shelton v. Springett*, 11 C. B. 452; *Mortimore v. Wright*, 6 M. & W. 482.

Anderson, contra, cited *Baker v. Keene*, 2 Starkie, 501; *Blackburn v. Mackey*, 1 C. & P. 1; *Fluck v. Tollmache*, ib. 5; *Camen v. Baker*, ib. 268; *Nichle v. Allen*, 3 C. & P. 36;

Rolfe v. Abbott, 6 C. & P. 286 ; *Clements v. Williams*, 8 C. & P. 58 ; *Seaborne v. Neaddy*, 9 C. & P. 497 ; *Urmston v. Newcomen*, 4 A. & E. 899 ; *Law v. Wilkin*, 6 A. & E. 718 ; *Mortimore v. Wright*, 6 M. & W. 482.

RICHARDS, C. J., delivered the judgment of the Court.

The doctrine laid down in *Chitty* on Contracts, 8th edition, p. 146, to which we have been referred by the defendant's counsel is, "that a father is not under any legal obligation to educate his child, and that he cannot be made liable if the circumstances absolutely negative his assent to any contract with the party who instructed the child ; and when a parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child, even for necessities, than a mere stranger would be. But if it were shewn that the child lived under the father's roof, and that the goods were necessities and were delivered at the residence of the father, this might be *primâ facie* sufficient to raise a presumption of the father's liability ; whilst on the other hand, if it appeared that the father supplied his child with money for the purpose of procuring the articles in question, or that he ordered those articles to be furnished elsewhere, either of those circumstances would rebut the presumption that he had authority from the father to order them ; and it would seem that the mere fact of the articles themselves being necessary for the child and suitable to that station, in which the father has placed him, will not warrant the jury in finding that such authority was actually given."

In *Mortimore v. Wright* (6 M. & W. 482), followed and supported by *Shelton v. Springett* (11 C. B. 452), the judgment of the Court of Queen's Bench in *Law v. Wilkins* (6 A. & E. 718) is disapproved of. Lord Abinger, after referring to that case, says, "It appears to me to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative ; which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may be

reasonably inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the part of the father to maintain his child affords no inference of a legal promise to pay his debts, and we ought not to put upon his acts an interpretation which, abstractedly, by and without reference to that moral obligation, they will not reasonably warrant."

He then concludes that, to bind the father in point of law for a debt incurred by the son, he must contract to be bound just in the same way as you would prove a contract against any other person.

The near relationship between the parties, father and son, with knowledge on the father's part of the liability being incurred, furnishes presumption of approbation, unless the contrary be shewn: *Story* on Agency, 256-7.

We think the facts shewn at the trial, particularly the delivery of the articles of clothing at defendant's house for his sons, and the language of the letter of the defendant to the plaintiff, quite sufficient in the absence of any evidence repelling the presumption of his authority to his sons to contract the liability in his name, to justify the finding of the jury.

We do not quite agree with the learned Judge of the County Court that the infancy of the defendant's sons was necessary to be shewn to make him liable, though it no doubt would be a circumstance to go to the jury. I do not think the learned Judge was guilty of non-direction in not referring to the infancy of defendant's sons in charging the jury.

We think this appeal should be allowed without costs, and the rule *nisi* in the Court below to set aside the verdict should be discharged with costs.

Appeal allowed, without costs.

COTTER V. SUTHERLAND.

STEVENS ET AL. V. JACQUES ET AL.

The Surveyor General's or the Commissioner of Crown Lands List—Assessment—Treasurer's return—Writ a warrant to sell—Distress on land—Advertisement—Sale itself—Effect of payment—Description of land sold—Sheriff's deed—Law on the sale of land for taxes reviewed as determined by cases in regard to.

Under the Statute 59 Geo. III. c. 7, 4th Sess., it was the duty of the Court of Quarter Sessions to assess the amount of taxes to be paid upon lands, not exceeding the sum of one penny in the £ of the statutable value, and where the Treasurer of his own motion charged every wild lot one penny in the £ of such value, the sale of land for such taxes was held invalid.

Quære, as to the manner in which wild lands of non-residents, not included in the assessment rolls, were to be rated under such Act, and *Semble*, such lands not assessable at all.

Tax Statutes should not be construed as Statutes creating a forfeiture, but rather in the same manner as Statutes by which lands are sold under execution for debt, and the same rules which apply to sales under execution should govern tax sales.—*Per A. Wilson, J.*

Strict proof should be given as to the legality of the tax and its actual imposition, but in matters concerning its collection unnecessary or unreasonable rigour in carrying out the clause of the Statutes should not be exacted from the officials entrusted therewith.—*Per A. Wilson, J.*

2. Where land has been sold for a larger amount of taxes than has been or can be lawfully imposed, such sale is void.

3. It is necessary that the Treasurer should keep his accounts of taxes due according to the Statute, in order to validate the sale.

4. In this case it was held, following *Doe d. Mountcashel v. Green*, 4 U. C. R. 23, no objection to the sale, that part of the taxes for which the sale was made, accrued to the former Home District, while the sale was made by the Sheriff of the Simcoe District, to which district the residue of the taxes was owing.

5. The omission of the Treasurer to advertise the list returned by him to the Court of Q. S., within one month thereafter, and the omission to advertise such lot in the Official *Gazette*, and imperfections in the advertising, are irregularities cured by 6 Geo. IV. c. 7, s. 22, and by analogy to the holding of the Courts in cases of sales under execution.

Considerations as to what requirements of the Tax Acts are imperative and what are merely directory.

6. The Sheriff's advertisements of the sale and its postponement in the *Gazette* in these cases were held sufficient.

7. It is competent to sell the whole of a lot for taxes, and the Court will not presume against a sale on the supposition too much land was sold for a small amount.

8. When, before conveyance, the Acts under which the sale is made are repealed without any saving clause, the Sheriff's deed subsequently given will be void (following *Bryant v. Hill*, 23 U. C. R. 96); but it is competent for the purchaser to set up a defence under the Sheriff's certificate given at the time of sale, notwithstanding he has given it up on receiving the invalid conveyance.

9. Sales for taxes made after return day of the writ to sell are valid.
10. When taxes are in fact imposed on patented lands, and no return of the Surveyor General of the land having been granted can be found or proved, such return may be presumed.
11. When, owing to land being patented in July, taxes are charged thereon only for half a year, yet that is in effect a taxation for the whole of the fiscal year, and so long as the patent issues before the assessment is completed, taxes for the whole of the year wherein such patent issues may be properly imposed, and the lands sold therefor if unpaid.
12. Under the Sheriff's certificate the purchaser is entitled to possession of the land sold, and being in part possession he can avail himself of such certificate as a defence to an action of ejectment by the owner of the land, even though he has not received a deed or a valid deed from the Sheriff; and *Seemle*, he could maintain ejectment on such certificate against any one in possession under the former owner.

BOTH of these cases were actions of ejectment, the former being for the south-half of lot No. 15, in the second concession of the Township of Nottawasaga.

The plaintiff claimed possession under a patent of the land from the Crown to himself.

The defendant, besides denying the plaintiff's title, asserted title in himself, under a deed of the 8th of December, 1862, made to him by John Smith, who derived title by a deed, dated the 15th of February, 1858, from one Donald McDonald, who purchased the said land at Sheriff's sale for taxes from the Sheriff of the County of Simcoe, and duly obtained a deed thereof from the said Sheriff.

The cause came on for trial before the Chief Justice of this Court at the last Fall Assizes, held at Barrie, and as the case was one of very great importance and the evidence applied as well to the case of *Stevens v. Jacques* and others, it is given in full, as follows:

The patent to the plaintiff of the land in question was put in, dated 20th of July, 1839, and was the case for the plaintiff.

The defendant called several witnesses.

John McDonald said: "I am Treasurer of York and Peel. By the return sent to the office of the Treasurer of the former Home District this land appears in the return made of lands granted between the 1st of July, 1839, and 1st January, 1840. The Simcoe District was set apart from the Home District, I think, on the 1st of January,

1843. There is no mention of taxes having been paid by any one on the land in the Home District, or in the County of York. There is an entry in the non-resident tax book in regard to this lot, shewing that the taxes from the 1st of July, 1840, and for 1841 and 1842, were paid. They were paid to the County of York by Mr. Lally, the Treasurer of the County of Simcoe, on the 21st of January, 1851. The practice of the office, as I have been informed and believe, was, upon the return being received that the lot was patented, to enter it as patented, and, when the owner came to pay the taxes, to make up the amount then according to the Statute, and to receive that amount, which was then marked as paid for the respective years for which the payment was made, and to enter that sum in the cash book. The return applying to the lot is dated 12th December, 1840, and I presume it was received shortly after that date."

Edmund Lally : "I was Treasurer of the Simcoe District from 1845 till the beginning of 1861. I have two books, in which the lot is entered ; the first, in which the return was made by the Treasurer of the Home District. The lot was returned as being in arrear for two and a half years to the 31st of December, 1842, and marked paid. There was no assessment roll. There was a statutory tax. The amount of the tax was not entered in the book, but a blank was left opposite each year until the taxes were paid, and when they were paid there was entered under the year, for which the payment was made, "paid," and the folio of the cash book in which the entry was made. There were no taxes paid by Mr. Cotter up to 1850. In the year 1849 I made a return to the Clerk of the Peace of lands that were liable to be sold. I am confident there were no lands returned on that list, unless those on which taxes were in arrear—taxes due, either in whole or in part, for at least eight years. I cannot speak of this particular lot being in the list, but I find the whole of it was sold on 3rd July, 1850, by the Sheriff. I ascertained this by the Sheriff's return of the

lands sold. This is my return made to the Treasurer of the County of York, including the amounts due on this lot. The portion of it applicable to this lot was made by the sale of the lot. The return of the lands in arrear was made before the July Sessions. I gave my list of the lands in arrear to Mr. McVitty, the Clerk of the Peace, or to Mr. —, who acted for him. I am not aware I ever got back my return from the Clerk of the Peace. I have no reason to suppose I ever received it back. I made two returns: one, in 1846, the other, in 1849. I think the list, which was published in the "*Barrie Magnet*," is correct. I think I made out the return in rough and copied it out for the publication, and for the Clerk of the Peace. I know of no reason why I should have got it back. The date at the foot of the advertisement is an error: it should have been 1849 instead of 1848. The taxes on the warrant were only to the end of 1846. The District Council in 1847 and 1848 imposed a tax of one penny an acre, which I considered to be illegal, and I did not include this in the warrant; but the time that was in arrear was to the end of 1848. I intended to return all the lands in arrear to the end of 1848. I believe I advertised this in the *Gazette*, but I cannot say. From the cash book it appears to me the Sheriff paid the taxes in to me on the 8th of December, 1850, for all the lands sold by him for taxes at that time. I believe the return certified that the lands included in the list were eight years in arrear for taxes. I supposed it embraced the lot in question. The land would be a year in arrear on 1st of July, 1841, I understood. I make the eight and a half years in arrear on the 31st of December, 1848. This lot was not redeemed."

Wm. B. McVitty: "I am Clerk of the Peace, and was so in 1844. The Treasurer, before the sittings of the Quarter Sessions in July, made a return of the lands in arrear for taxes. The proper place for the return to be is in my office. I have made diligent search for it, but cannot find it. This warrant was made out by me: it contains the list of lands from the return in the Township of Notta-

wasaga. I have no minute in my book of the time I received the return. I did not get any return in 1848. I never got but the one return. I am not sure whether it was printed or written: think it was in writing. I am sure the warrant contains a true copy of the part relating to Nottawasaga. I think the other townships in the list were also correctly copied. I might have given it to the Treasurer, or to some person, for publication, but I have no recollection of doing so. The figures are in my handwriting: the written part was done by my Clerk. I do not know why we kept copies of the writs to the Sheriff. I have no recollection what was done with the original. At the sittings of the Quarter Sessions on the 4th of July, 1849, there was an order made to sell the rated wild lands for arrears of taxes. I have no recollection of giving the return to any one: it would be contrary to my duty to give it to any one. The return of the Treasurer was submitted to the Quarter Sessions at the sittings in July, 1849, and on the 4th of that month the order was made that the Clerk of the Peace should issue the warrant. The warrant produced is the one I prepared in relation to Nottawasaga. I believe it correctly recites the lands in the return, in all respects. I prepared it and delivered it to the Sheriff."

B. W. Smith: "I was Sheriff of Simcoe in 1849. I received the writ on 30th of August, 1849, to sell lands in arrears for taxes in Nottawasaga. I advertised the lands and sold them. I advertised them in the local paper and in the *Gazette* for sale on 3rd of April, 1850, being the second day of the Quarter Sessions. They were offered for sale then at the upset price of 2s. 6d. per acre; but there were no bidders at that price. They were put up on the 3rd of July following, and were sold without reserve. The mode of selling was, by stating the amount of taxes, and that whoever would take the smallest amount of land and pay the taxes would be accepted as the purchaser. Donald McDonald became the purchaser of this lot—the whole hundred acres. No one would take less. He paid the money, and I gave him a certificate of the purchase,

which I now produce, dated the 8th of July, 1850. I sold the other lands. I made a return to the Registrar of the lands sold, dated 7th July, 1851. This lot is included in it. McDonald produced a certificate that it was not redeemed, as well as my own certificate, and I then gave him the deed, dated 1st July, 1851. The deed is sealed with my seal of office, and is signed by me. I advertised the first sale in the *Gazette* for April. I don't know when it was first inserted. I put in the advertisement in the local paper first: advertisement in *Gazette*, in paper 1st June, 1850: it was sold on 3rd of July. I am not aware I took any step to sell on the 1st of July. The second day of the Quarter Sessions was the 3rd of July. I understood Mr. Lally's practice was to advertise for some time, and that he would make it up for ———. The first insertion in the local paper is the 2nd of August, 1849, which was continued consecutively to the 20th September, inclusively, about twenty ———."

The deed from Hon. Donald McDonald to John Smith, dated the 15th of July, 1858, and the deed from John Smith to the defendant, dated the 8th of December, 1862, were put in and admitted.

James Pearson: "I live in Nottawasaga. I know the land. It was a wild bush till thirteen or fourteen years ago. Defendant occupies it, and improved it: forty acres now improved, with house and barn. In 1850 the lot was of little value, hardly worth paying taxes. I came to Nottawasaga about twenty-two years ago. I have known this lot ever since that time. It is ten or eleven years since the first clearing was made on the lot."

Angus Gunn: "I live in Nottawasaga. I know this lot—have known it between ten and twelve years. It was a wild lot when I saw it first. After that a man took a contract to clear twelve acres of it."

Many objections were then taken by the plaintiff's counsel, which need not be stated here, as they are all embodied in the rule set out below: the result was that a verdict was entered for the defendant, with leave to the

plaintiff to move to enter a verdict for him, if the Court should be of opinion, upon the whole case, that he was entitled to succeed; and the Court was to be at liberty to draw all inferences of fact, if necessary, as a jury might.

In Michaelmas term last *McCarty* obtained a rule *nisi* to set aside the verdict, and enter it for the plaintiff, pursuant to leave reserved, on the following grounds:

1. That the sale for taxes of the land in question, and the alleged conveyance from the Sheriff of the County of Simcoe, in pursuance thereof, and under which the defendant asserted title, was illegal, invalid and void, in this, that there was no assessment of the taxes alleged to be in arrear, and for which the said sale was made.

2. That there being no such assessment or imposition of taxes by the Court of General Quarter Sessions for the District, in which the said land was situated, or by the Treasurer of said District, that the only taxes due thereon, and for which the land was liable to be sold, was the one-eighth of a penny per acre on the statutable value thereof for assessment purposes, in pursuance of section three of the Act 59 Geo. III. ch. 8, whereas the said land was sold for taxes alleged to be in arrear to a much larger amount, and the said sale was therefore illegal.

3. That the said sale was illegal and invalid, in this, that the Treasurer had not kept and did not keep an account with respect to said land and charge the same with the taxes due thereon, in pursuance of the fourteenth section of the Act 59 Geo. III. ch. 7, and that the proceedings necessary to ground a legal sale for taxes were not therefore complied with.

4. That the taxes alleged to be due on the lot, or any part thereof, were not in fact eight years in arrear at the time that the Treasurer was alleged to have made his return to the Court of Quarter Sessions, on which the warrant to the Sheriff was granted.

5. That it appeared that a portion of the taxes, for which the land was sold, were alleged to be due when the same

was comprised in the Home District, and the said sale was made in the Simcoe District for said alleged taxes, which was illegal: the Treasurer for the Simcoe District had no authority to enforce taxes due to the Home District, and without such alleged taxes there would not have been any taxes for eight years in arrear.

6. That the Treasurer did not, as required by the Statute, advertise the list of lands, which were returned by him to the Court of Quarter Sessions in the year in which the lot of land in question herein was returned, within one month thereafter, nor in the *Canada Gazette* at all, and the subsequent proceedings to sell were therefore illegal.

7. That the Sheriff did not advertise the sale, as required by law, and improperly and by advertising for a wrong day rendered the said sale made by him irregular and void.

8. That the Sheriff sold the whole of the land, while he was only empowered by the warrant to him and by the law then in force to sell a portion thereof.

9. That the conveyance, even if the sale were legal, being made after the repeal of the acts under which it was made, was void.

10. That said sale was made after the return day of the warrant to him, and was on this ground illegal.

The following exhibits were relied upon :

1. Schedule of lots in the Home District, dated 12th December, 1840, returned by the Surveyor General to the Treasurer of the Home District as lands for which patents had issued from the 1st of July, 1839, to the 30th of June 1840, inclusive, [among other lands,]

NOTTAWASAGA. .

	LOT.	CONCESSION.	ACRES.
George S. Cotter.....	S. $\frac{1}{2}$ 15	2	100

Extracted from the book in the office of the Treasurer of York and Peel.

2. Account with the lot in Treasurer's book :

2ND CONCESSION: [NOTTAWASAGA.]

NO. OF LOT.	ACRES.	WHEN TAX COMMENCED		1840.	1841.	1842.
15 South.	100	1840.	F. 621.	Paid.	P.	P.

Extracted from the book in the preceeding exhibit mentioned.

3. "Taxes received for the County of York by Edmund Lally, Treasurer of the County of Simcoe, from 1st July to 30th December, 1850.

TOWNSHIP.	LOT.	CONCESSION.	ACRES.	PERIOD OF PAYMENT.
Nottawasaga.	S. $\frac{1}{2}$, 15	2	100	2 $\frac{1}{2}$ years to 31st December, 1842.

Extracted from the return made by Edmund Lally, Treasurer of the County of Simcoe, to the Treasurer of the Home District, of taxes received by him for the County of York.

4. "The list of wild lands furnished to the Clerks of the Peace by the Treasurer of the District on which the arrears of taxes were due was laid before the Court, upon which the Clerk of the Peace was ordered to issue the writs pursuant to Statute."

The above is a true copy of the order of Sessions at the July Quarter Sessions for the County of Simcoe on the 4th of July, 1849.

5. *Barrie Magnet* newspaper, issued 23rd August, 1849.

"Schedule of land in the District of Simcoe liable to sale for arrears of taxes on the 1st day of July, 1849."

NOTTAWASAGA.

* * * * *

SECOND CONCESSION.

No. — — — South half 15 — — —
 &c., &c., &c., &c., &c.

EDMUND LALLY,
Treasurer, District of Simcoe."

Treasurer's Office,
 Barrie, 15th July, 1848.*

The above is the advertisement referred to in the evidence.

6. "£1 15s. 5d.

I certify that Donald McDonald has become the purchaser of one hundred acres of the south-half of lot fifteen, in the second concession of the Township of Nottawasaga, under the provisions of the Statute for that purpose made, for the consideration of one pound fifteen shillings and five pence, being the charges thereupon, which I hereby acknowledge to have received.

B. W. SMITH,
Sheriff, County of Simcoe."

3rd July, 1850, Sheriff's Office, Barrie.

The above certificate bears upon it the following endorsement:—

7. "Not redeemed.

EDMUND LALLY,
Treasurer, County Simcoe."

Barrie, July 3rd, 1851.

8. I hereby certify that the undermentioned lands have been sold and conveyed by me, as the Sheriff of the County of Simcoe, by virtue of certain writs to me directed, according to the law in that behalf, for arrears of assessments

* Should be 1849.

to the undermentioned persons, being the purchasers of the same at public auction.

No.	NAME OF PURCHASER.	RESIDENCE.	COUNTY.	AMOUNT PAID.	NO. OF ACRES.	LOT.	CON.	TOWNSHIP.	DATE OF CONVEYANCE.
**	* * *	* * *	* *	* *	* *	* *	**	* *	* *
280	D. McDonald	Toronto.	York.	£1 15 5	100	S. $\frac{1}{2}$ 15	2	Nottawasaga.	7th July, 1851.

B. W. SMITH,
Sheriff, C. S. [L.S.]

No. 10171 recorded the 16th July, A.D. 1851, at half-past two o'clock, P. M., in Lib. K. L., folio 41842, in Lib. L., folio 155, in Lib. V, folio 95, in Lib. G. H. folio 111, in Lib. J, folio 361, in Lib P, folio 116, Lib. E. F. 75, and in Lib M, folio 56.

GEORGE LOUNT,
Registrar, County Simcoe."

9. The Sheriff's deed, before mentioned, registered 26th July, 1851.

10. Copy of Sheriff's advertisement in the *Gazette* :

SHERIFF'S SALE OF LAND FOR TAXES.

"Simcoe District, } "By virtue of certain writs issued by
 To Wit : } the Clerk of the Peace and to me
 directed for the collection of arrears of assessment due upon
 lots and parcels of land in the townships of * * * *
 Nottawasaga, Sunnidale * * * and which said lands
 have been duly advertised by the Treasurer of the said
 District under date of the 15th July, 1849, I hereby give
 notice that I will, on the second day of the Quarter Sessions
 in April next, at the Court House, in Barrie, at twelve
 o'clock noon, offer for sale such portion of the lots and
 parcels of lots of land in the said writs mentioned as may,
 at two shillings and six pence per acre, be necessary to pay
 the arrearages thereupon ; and that I shall on the second day
 of the Quarter Sessions in July following, at the same place

and hour, sell so much of each lot or parcel of land remaining in arrear for want of bidder as may be necessary to pay the said arrears and charges at the best price to be obtained.

B. W. SMITH, *Sheriff, S. D.*

Barrie, 14th August, 1849."

Published in the *Gazette* from 13th October 1849, till 9th February, 1850, both inclusive.

The same form of notice was republished in the *Gazette* from the 20th of April 1850, to the 1st of June following, both inclusive; at the foot of which advertisement was the following memorandum:—

"The above sale is postponed to first July at the same place and hour.

B. W. SMITH, *Sheriff, S. D.*

Barrie, 8th April, 1850."

The same form of notice as the first, without the memorandum at the foot of the second, was also published in the *Gazette* from the 11th of May, 1850, to the 20th July following, both inclusive.

The case of *Stevens v. Jacques et al.*, was ejectment for lot number nine, in the third concession of Sunnidale, in the County of Simcoe.

The plaintiff claimed under a deed to him from a number of persons, who were the co-heirs and co-heiresses with him of Adam Stevens, the grantee of Alexander Stevens, who was the patentee of the Crown.

Jacques & Hay, besides denying the plaintiff's title, asserted title in themselves, under an indenture made between Benjamin Walker Smith, Sheriff of the County of Simcoe, and Alexander McDonald, and under an indenture made between the said Alexander McDonald and themselves.

The Edinburgh Life Assurance Co. denied the title of the plaintiff and asserted title in themselves, under an indenture of mortgage made between Jacques & Hay and the Company.

The other defendant, Campbell, did not appear.

This case also came on for trial at the last Fall Assizes at Barrie, before the Chief Justice of this Court. No trial, however, took place, a verdict having been entered for the plaintiff, with leave to the defendants to move to enter a verdict for them upon the facts of a case to be argued upon by the parties.

The case stated was as follows :

1. That pursuant to an order in Council, made the first day of May, 1834, one Alexander Stevens, a son of a U. E. Loyalist, became thereby entitled to a grant in fee simple from the Government of two hundred acres of land in Upper Canada, and on the 14th October, 1840, the same was located as the land in question in this cause, to be granted as afore-said. The course of proceeding was that the applicant for land presented a petition to the Governor in Council, praying for a grant of land, and stating his or her claim to it as a U. E. Loyalist, or the child of a U. E. Loyalist. The petition was referred to the Inspector General, and if he reported that the petitioner was the person represented, an order in Council was passed that a grant of land, specifying the quantity, should be made to the petitioner. The order was then filed in the Surveyor General's office, and at any time thereafter the grantee, or his or her representative, could select the necessary quantity of lands from any of the vacant lands of the Crown ; and on the selection being made the grant was said to be *located*.

2. That, pursuant to such order and location, a grant from the Crown of said lands was made to the said Alexander Stevens, in fee, on the 23rd of July, 1841.

3. That, from the time of the grant till after the conveyance by the Sheriff, said land was in a state of nature, and there was nothing thereon whereon a distress could be made, and the owners thereof did not reside at any time in the township where the land lay before the sale was made by the Sheriff.

4. That on or about the year 1856 defendants, Jacques & Hay, first took possession of the land and cultivated about ten acres thereof, or cleared the same, prior to which time the land was wild land.

5. That the warrant to the Sheriff to sell was the same as in the case of *Cotter v. Sutherland*, but the amount said therein to be in arrear was £2 4s. 8d., as for five years and a half taxes, being the last half-year, ending in 1841, and the five years next following that year.

6. That the Township of Sunnidale, on and after the 1st of January, 1842, was detached from the Home District, to which it had previously belonged, and became part of the District of Simcoe.

7. That the present Treasurer of York and Peel stated he supposed there was a return to the then Treasurer of the Home District of the lands in question having been granted by Her Majesty, but on search he could not find it.

8. That due search had been made for such return, but no return or account could be found of the Treasurer as to the land being in arrear for taxes prior to the warrant to the Sheriff.

9. That a writ, dated the 20th July, 1849, was issued to the Sheriff by the Clerk of the Peace of the County of Simcoe, reciting that eight years' taxes were in arrear on the said land, which land was therein charged as for five and a half years taxes, as aforesaid; that is, for one year and a half taxes, while the land was in the Home District, and for four years' taxes next thereafter, while the land was in the District of Simcoe; and that reference might be had to the original warrant or copy filed in the case of *Cotter v. Sutherland*.

10. That the lands were advertised by the Treasurer and Sheriff as the lands were advertised in the last mentioned cause.

11. That the lands were sold under said writ by the Sheriff to one Alexander McDonald, as purchaser.

12. That the land was not redeemed, and no taxes were in fact paid except by the said Alexander McDonald, he such purchaser, up to the time of the conveyance from the Sheriff.

13. That at the time of the sale the Sheriff gave said McDonald, as purchaser, a certificate under his hand, specifying the particulars thereof, pursuant to the Statute, who

returned the same to said Sheriff on the execution by him of the conveyance next mentioned.

14. That the Sheriff conveyed the lot in fee to said McDonald, in pursuance of said sale, by deed, dated 7th of July, 1851, which was registered in the County Registry Office, on 26th July, 1851.

15. That McDonald afterwards conveyed the land to Jacques & Hay, in fee, who afterwards mortgaged the same to the Edinburgh Life Assurance Company in fee.

16. That the evidence in the cause of *Cotter v. Sutherland* was to be received and read as evidence in this case, as far as it might be applicable to the land in question, said land having been sold under the same advertisements; return by the Treasurer, if any; writ to the Sheriff; time and place; and for a sum which was charged or imposed upon the land in like manner as the wild land tax was alleged to have been charged or imposed by the Treasurers of the Home and Simcoe Districts on the land in the case of *Cotter v. Sutherland*.

In Michaelmas Term last, *Leith* obtained a rule *nisi* to set aside the verdict and enter it for the defendants; or for a new trial on the leave reserved, on the ground that the sale for taxes was a valid sale, as also the conveyance by the Sheriff a valid conveyance; or, if such conveyance were not valid, that the certificate granted by the said Sheriff was sufficient whereon to retain possession, or defend this action.

The case of *Stevens v. Jacques* and others was similar to the case of *Cotter v. Sutherland*, except that in the last case it was not denied that the land in Nottawasaga was duly returned by the Surveyor-General to the Treasurer of the Home District for the purposes of assessment, and excepting that it was not denied the full term of eight years had elapsed, for which the taxes were or some portion of them was in arrear.

The two cases were argued separately; the case of *Stevens v. Jacques* and others by J. A. Boyd for the

plaintiff, and by *Leith* for the defendants; and the case of *Cotter v. Sutherland* by *McCarthy* and *Boyd* for the plaintiff, and by *Harrison* for the defendants.

The arguments in the two cases are given together.

For the plaintiffs, who respectively impeached the sales for taxes, it was argued :—

1. That there had been no assessment of the land to justify the imposition of the taxes alleged to have been in arrear, and for which the land was sold.

The mere act of the Treasurer in charging every acre of uncultivated land at the maximum rate of one penny in the pound was illegal, because that sum was not necessarily the rate to be imposed; but if it were, he was not the person to impose it: that duty was expressly required to be performed by the Court of Quarter Sessions: 59 Geo. III. ch. 7, s. 7.

There having been no legal assessment, the sale founded upon it must be void.

That the taxes were required to be imposed either by the Quarter Sessions or the Treasurer. The Quarter Sessions did not impose it, nor did the Treasurer keep such accounts and books as the Statute prescribes for taxes; *i.e.*, shewing the taxes due on each lot, and it would appear to be only in this way, if at all, that he had the power of imposing taxes; and therefore the taxes were not imposed by the Treasurer: *Brattan v. Mitchell*, 1 Watts & Sargt. 310; *Munro v. Grey*, 12 U. C. R. 647; *Blackwell* on Tax Titles, 345–371.

The 59 Geo. III. ch. 8, s. 3, which provided that every lot of land, “subject to be rated and assessed, but which, by reason of its remaining unoccupied, or for other cause, may not be included in the assessment roll * * * shall nevertheless be rated and assessed at one-eighth of a penny per acre annually,” cannot be held to support the rate which was imposed, because the rate, for which the land was sold, was not in fact imposed under chapter 8, and because the rate of one-eighth of a penny per acre is different in amount from a penny in the pound upon every acre of land valued at four dollars, which is one-fifth of a penny per acre.

The 6 Geo. IV. ch. 7, s. 22, which provides "that no omission of any direction contained in this Act relative to notices or forms of proceeding previous to any sale made under this Act, shall extend to render such sale invalid," does not cover such a want of assessment as is here complained of: that section applies only to omissions of any directions as to notices or forms of proceedings required by that particular Act; and it does not extend to cover defects, omissions and the like in respect of duties and proceedings regulated by prior and subsequent Statutes.

If the land were subject to the one-eighth of a penny per acre, the land was sold for taxes alleged to be in arrear to a much greater amount, and this would avoid the sale: *Doe d. McGill v. Langton*, 9 U. C. R. 91; *Irwin v. Harrington*, 12 Grant, 179.

3. The Treasurer did not keep proper books of account, according to the 59 Geo. III. ch. 7, s. 14, and as the taxes had to be in arrear for a certain time before a sale could be made, and had to be increased in a particular ratio, and as all payments made had to be credited, it was important a proper account should have been kept with the lot, otherwise the Treasurer would not be able to tell whether the taxes upon any particular lot had been paid or not, or, if not paid, for how long they had been in arrear: *Hall v. Hill*, 22 U. C. R. 578; *Williams v. Taylor*, 13 C. P. 219; *Blackwell on Tax Titles*, 34; *Thatcher v. Powell*, 6 Wheaton, 119; *Minor v. The President, &c., of Natchez*, 4 Smedes & Marshall, 628.

4. A portion of the taxes for which the land was sold, had become due when the land was comprised in the Home District, and the Treasurer of the Simcoe District had no power to sell for such arrears; and if these arrears be not computed, there were not in fact eight years arrears of taxes due, and the sale was therefore illegal.

In *Cotter v. Sutherland* the land was sold for taxes alleged to be due from the 1st of July, 1840, to the end of 1846, and still remaining due on the 31st of December, 1848, the years 1847 and 1848 not having been included in the warrant for the reason before given by Mr. Lally.

The period from the 1st of July, 1840, to the end of December, 1842, or two-and-a-half years, was for taxes claimed against the lot by the Home District, up to which time the land was a part of the Home District: the Simcoe District being set apart from it on the 1st of January, 1843, the remaining four years of taxes were claimed by the Simcoe District, that is, from the 1st of January, 1843, to the 31st of December, 1846.

In *Stevens v. Jacques*, the land was sold for taxes alleged to be due from the 1st of July, 1841, to the 31st of December, 1846, but which still remained due at the end of 1848, the taxes for 1847 and 1848 not having been included in the warrant for sale, as before mentioned.

The taxes for the period from the 1st of July, 1841, to the 31st of December, 1842, were claimed by the Home District, and from the 1st of July, 1843, to the end of 1846, by the Simcoe District.

The warrant to sell issued the 20th of July, 1849.

5. The Treasurer did not advertise the list of lands returned by him to the Quarter Sessions as in arrear for taxes within one month after such return, nor in the *Canada Gazette* at all, and all subsequent proceedings were therefore illegal.

The 6 Geo. IV. ch. 7, sec. 9, expressly requires that such advertisement shall be made. There was no advertisement in the *Gazette* by the Treasurer of any kind, and the first advertisement in a Simcoe District newspaper was on the 23rd of August, 1849, while the return made by him to the Clerk of the Peace was on or before the 4th of July, 1849.

The 22nd section of the 6 Geo. IV. ch. 7, before referred to, will not cure such a total neglect to advertise in the *Gazette*, or even so late an advertisement as was made in the local paper.

6. The Sheriff did not duly advertise the sale as required by law, and by advertising the sale for a wrong day he made his sale irregular and void.

The Sheriff received the writ on the 30th of August, 1849: his first advertisement in the local paper was on the

He first advertised in the *Gazette*

on the 13th of October, 1849, and he published on the 20th of April, 1850, notice of an adjourned sale to be held on the 1st of July, 1850, while the sale, without being further adjourned, did not take place till the 3rd of July, which was the second day of the Quarter Sessions.

This last advertisement does not specify the different lots to be sold, and it published a wrong day, and a different day from that upon which the sale was in fact made.

7. However regular the advertisements and form of sale may have been, the Sheriff had no power to sell the whole of the lot. The 6 Geo. IV. ch. 7, sec. 12, speaks of "the least quantity or portion" of the lot being sold. Section 14 speaks also of "such portion" of the lot being sold. Sections 17 and 18, in speaking of the "parcel of land" bid off, must be read with section 19, which shews that the parcel is "the number of acres sold, of the lot or tract of which the same form a part;" and the 7 Wm. IV. ch. 19, s. 2, speaks also of "so much of the land" being sold, even when there has been no bidding for it at the price of two shillings and six pence per acre: *Doe d. Bell v. Reaumore*, 3 O. S. 245.

8. The conveyances made to the purchasers by the Sheriff were void, even although the sales were legal, because they were made under the repeal of the Statutes under which the sales had been made, and by which order the Sheriff was authorized to make the deeds. The deeds were made in July, 1851, and at that time the 13 and 14 Vic. ch. 66 had repealed all the previous enactments. The cases of *Bryant v. Hill*, 23 U. C. 96, and *McDonald v. McDonell*, 24 U. C. 424, are conclusive on the point, and the 29 Vic. ch. 26, which was passed to give relief in certain cases somewhat like the present, was passed in consequence of these decisions.

[In the case of *Cotter v. Sutherland* it was denied that the Statute was passed for such a purpose: in *Stevens v. Jacques* this point was not denied by the defendant's counsel.]

9. The sale, having been made after the return day of the warrant, was invalid.

It was further argued in the case of *Stevens v. Jacques* that no part of the taxes was in fact eight years in arrear on the 31st of December, 1848. If the period were computed from the 1st of July, 1841, the patent having issued on the 23rd of that month, there would at the end of 1848 have been some taxes due only for seven-and-a-half years; but the proper mode of computing the period of assessment for fiscal purposes was from the 1st of January of each year, and the proper first of January in this case was the 1st of January, 1842, and not the prior January. The case of *Doe dem Stata v. Smith*, 9 U. C. 658, does not enable these defendants to compute assessments from the 1st of January, 1841, because in that case the Surveyor General's return was made before the 1st of July of that year, while here no return was proved to have been made at all of the lot, and the land only became chargeable for taxes after the issuing of the patent, which was not till the 23rd of July, 1841.

If, however, the taxes could be computed from the middle of a year, that is from the 1st of July, then it was clear the taxes could not have been charged for further back than the 1st of July, 1841, and from that time there was no portion of taxes eight years in arrear at the end of 1848, and the case of *Hamilton v. McDonald*, 22 U. C. 136, shewed that the taxes could be computed from the middle of one year to the middle of another year, that is, from July to July. The sale in this case then was wholly illegal, because made at a time and for a sum which was not the proper length of time overdue.

The last objection in *Stevens v. Jacques* is that no return by the Surveyor General was proved to have been made of the lot in Sunnidale to the Treasurer of the Home District, and by the 59 George III. ch. 7, section 13, such lot did not, therefore, become chargeable with any rates or taxes, and could not have been sold for any alleged arrears claimed against the land: *Doe d. Bell v. Orr*, 5 O. S. 433; *Perry v. Powell*, 8 U. C. 253; *Peck v. Munro*, 6 C. P. 372.

In this same case it was objected that the defendants

Jacques & Hay could not rely on the Sheriff's certificate, because they had not specified it in their notice of claim: *Kinsey v. Newcome*, 17 C. P. 99; *Fields v. Livingstone*, 17 C. P. 15; *Canada Company v. Weir*, 7 C. P. 341.

Then, it was further argued for both plaintiffs, in anticipation of the argument of the defendants, that notwithstanding the 17th & 18th sections of the 6 Geo. IV. ch. 7, the defendants were not entitled to retain the possession under their certificates, because at no time, while the purchaser held the certificates, had they taken the actual possession of the land under it: *Austin v. The Corporation of Simcoe*, 22 U. C. 79: that the right to the possession was only during the period of the redeemable year: that, when the Sheriff gave the deeds and took back the certificates, the rights which the certificates may have conferred were determined, and whatever rights the parties had or were entitled to were then held by them only under the deeds: that although the deeds were not legally binding, that did not revive the certificates; that whenever the Sheriff became disabled, by reason of the repealing sentence, from perfecting his sale by a deed, the sale and certificate fell and became quite inoperative and void: *Doe d. Moffatt v. Hall, Tay.* Rep. 701: that the interest of the actual purchaser, though entitling him individually to the possession, was not such an interest as is transferable to any one else, and these defendants were assignees merely; and that, even if the possession could be rightly taken and held, it had only been taken, in fact, of a few acres, and the defendants therefore were not entitled to maintain their possession for more than they had actually taken, and the possession of these few acres would not draw along with them the possession of the whole lot: *Shaver v. Jamieson*, 25 U. C. 156; *Dundas v. Johnston*, 24 U. C. 547; *Young v. Elliott*, 25 U. C. 330.

For the defendants it was argued:

1. The putting of one penny in the pound upon wild land by the Treasurer, without any special assessment

being made by the Quarter Sessions, was a course that had to be adopted, because there were no other means of fixing any special rate on the uncultivated lands of absentees.

By the 59 Geo. III., ch. 7, sec. 3, the assessor was to obtain a list of ratable property from every ratable inhabitant *resident within the township*, and to make a return of all the ratable *inhabitants*, with a true list of all *their* ratable property, to the Quarter Sessions, which clause was substantially re-enacted by the 1 Vic. ch. 21, sec. 14.

Then, by sec. 7 of the 59 Geo. III. ch. 7, the Court of Quarter Sessions, after having ascertained the sum of money required to be raised, was required to apportion the same upon each and every person *in the said rate roll named* and liable to pay rates as aforesaid, after which the collector was furnished with a certified copy of the roll *so rated and ascertained*.

By sec. 10, if any person refused to pay the sum, for which *he stood rated as aforesaid*, the collector might distrain on his goods and chattels for the amount, and the provision was to be re-enacted by the 1 Vic. ch. 21, sec. 46.

The lands in question could not, therefore, from the facts proved and admitted, have been taxed and rated *upon the roll*.

They were liable for sale, however, under the 6 Geo. IV. ch. 7, secs. 6, 7, because that Act applied to all lands which had been returned by the Surveyor General.

If then they were subject to the right of sale, for what was that sale to be?

They might be sold for the one-eighth of the penny imposed by the 59 Geo. III. ch. 8, and they might be sold also for the rate imposed, not exceeding one penny in the pound, under ch. 7.

This last Act was not very clear as to the manner of imposing the rate, or the persons by whom it was to be imposed.

The universal practice had been to consider the wild land as subjected to the charge of the penny in the pound,

and everything should be presumed to have been done by persons performing a public duty.

2. If, however, the full rate could not be supported, there was a portion of it which was certainly well imposed, and for which legally a sale could have been made, and the whole sale should not be treated as invalid, if there was any part of the tax rightly due.

3. The Treasurer did all he was required to do in keeping his accounts with the respective lots; but if he did not, an innocent purchaser should not suffer from the consequences of his neglect: it was a matter of direction merely, and if he had neglected his duty to the prejudice of any one, he might be answerable in damages to the party injured; but it would not avoid the regularity or legality of the sale that had been made.

4. As to the warrant which was issued by the Treasurer of Simcoe including a portion of taxes that had become due upon the lands while they were in the County of York, the sale in such a case was valid: the 8 Vic. ch. 23, and the decision of *Doe d. Mount Cashel v. Grover*, 4 U. C., 22, were expressly in point.

5. As to the alleged neglect of the Treasurer to advertise the list of lands within one month after making his return to the Quarter Sessions in the local paper, and neglecting altogether to advertise the same in the *Gazette*, these irregularities were cured by the 6 Geo. IV. ch. 7, sec. 22: they were not of the essence of the transaction: they were directory only; and the absence of any required advertisements would not avoid a sale valid in other respects: *Jarvis v. Brooke*, 11 U. C. 299; *Doe d. Bell v. Orr*, 5 O. S. 433.

The case of *Hall v. Hill*, 22 U. C. 579, and affirmed in 2 Error and Appeal, 578, was a decision under the 16 Vic. ch. 182, and that Statute did not contain a curing clause such as is contained in the 6 Geo. IV. ch. 7.

Paterson v. Todd, 24 U. C. 296, shewed the advertisements of an intended sale under an execution, if not conformable to the Statute, would not avoid the title of a purchaser.

6. As to the alleged irregularity or insufficiency of the Sheriff's advertisements, the cases referred to upon the Treasurer's advertisements applied to those of the Sheriff, and the 6 Geo. IV. ch. 7, sec. 22, as well.

7. The Sheriff had the power to sell the whole lot, if a sale of the whole was necessary: *Doe d. Bell v. Reaumore*, 3 O. S. 245.

The 7 Wm. IV. ch. 19, sec. 2, speaks of "so much of the land being sold as may be necessary."

8. The conveyances to the purchasers, having been made after the repeal of the Statutes under which the sale had taken place, where no provision existed for completing such sales by conveyances, it was admitted, could not be maintained since the decisions of *Bryant v. Hill*, 23 U. C. 96, and *McDonald v. McDonell*, 24 U. C. 424, unless the fact of the time for redemption not having gone by in the case, when the repealing Act was passed, could make a difference.

The sales which were made by the Sheriff were not, however, vacated: the purchasers, and those who claimed under them, were still entitled to the possession of the land under the certificates of purchase which were given at the time of the sale.

The 6 Geo. IV. ch. 7, sec. 17, provided that, on payment by the purchaser, the Sheriff should give him a certificate under his hand, specifying the particulars of such sale, and the purchaser might forthwith go into possession of the land bid off to him; but if within twelve months the proprietor should pay to the Treasurer the amount levied and the expenses, and twenty per cent. in addition, he should be entitled to resume possession, and the right acquired by such purchase should thenceforth wholly cease and determine; and this certificate might be registered by sec. 19, as a title or conveyance, which should become absolute if the land were not redeemed within twelve calendar months from the time of the sale: sec. 18.

The Sheriff had in fact made deeds to the purchasers; but if he had not the power to do so, they were invalid, and could not avoid the effect of the certificates. It could not

be that the deeds were void, and that the making of them had put an end to the certificates and to their operation.

There was no time limited when these certificates should determine, excepting when the proprietor had redeemed his land, and excepting when it had been superseded by the superior efficacy of the Sheriff's deed : it was therefore a continuing document and title until it was expressly put an end to.

It was argued by the plaintiffs that the purchaser at Sheriff's sale, who holds by certificate, could not alienate the land he had bought ; but *Doe d. Bell v. Orr*, 5 O. S. 433, was a decision that such a transfer might be made ; and the purchaser had at the common law the right to convey such an interest, so long as he had not been prohibited from doing so ; that such an interest would pass by act of law, as by descent or devise, and might therefore well pass by conveyance *inter vivos*.

It was also argued by the plaintiffs, that the purchasers could not claim the possession, unless they entered within the year for redemption ; that a subsequent entry was not authorized : that defendants urged that the Statute permitted possession to be taken forthwith, that is, immediately after the purchase, if the purchaser desired it. He was not obliged to take it at that time : he might take it so long as the certificate was in operation : the proprietor was never to resume possession unless he had redeemed the land within the twelve months ; and, if he was not to take possession, who else could be entitled to it but the holder of the certificate ? That, admitting the Sheriff's deed to be invalid, by reason of the repeal of the Statute under which the sale was made, the only effect would be to leave the right of property in the plaintiffs, whilst the right of possession under the certificate would be in the defendants, and in that there was no anomaly : 2 *Black. Com.* 196-198 : that whatever right the defendant might or might not have, the plaintiff had not the right to possession : he was excluded from such right by the express terms of the Statute, and in ejectment must recover, if at all, on his own right.

Then it was argued that neither the purchasers, nor any persons claiming under them, had ever taken possession of the whole lots: they had taken actual possession of a part, and they had used the rest as much as people ever could use or occupy a whole lot of two hundred of acres: the actions now pending treated them as in possession, and the plaintiffs could not dispute the effect of their own proceedings.

9. That the sale was not held till after the return day of the warrant could be no objection, so long as the proceedings were begun within that time: the analogous proceeding upon writs of execution shewed that there was no weight in this objection.

Then it was further argued by Leith, as to the Sunnidale lot, in *Stevens v. Jacques*, that although it could not have been rated under the 59 Geo. III. ch. 7, sec. 13, because it had never been returned by the Surveyor General, it was, however, liable to be rated under sec. 4, as land held by promise of fee simple, or order of Council, even although it had never been described as granted under sec. 12, and therefore *Doe d. Bell v. Orr*, 5 O. S. 433, did not apply: that the Crown rights, as suggested in fol. 436 of the case last mentioned, could not be prejudiced by a sale of the Sunnidale lot for taxes, nor by any transfer which the party himself made: *Ryckman v. Van Voltenburg*, 6 C. P. 385: that every assignment of it ought to be registered in the Crown Land Office, by which the Crown would have direct notice: that if the clause of the Statute, making lands held on promise of fee simple, or order in Council, was not to be considered as of any effect, this case was precisely within it: that there was *no remedy* against land held by promise of fee simple, and not returned by the Surveyor General as described for grant under the 59 Geo. III. ch. 7, nor against lands *not* rated upon the roll; but there was a remedy for the one-eighth of a penny under the 59 Geo. III. ch. 8; and no remedy was given against such lands by the 6 Geo. IV. ch. 7, sec. 6, for that section applied only to such

lands as appeared in the schedule furnished to the Treasurer under the 59 Geo. III. ch. 7, secs. 12, 13. But the 9 Geo. IV. ch. 3, sec. 7, extended to such lands, for it provided that, *in all cases* where the assessments were unpaid for eight years *on any land*, the Treasurer should not receive less than the full arrears due upon such land, and the 9th section, repealing the 6th section of the 6 Geo. IV., directed the Clerks of the Peace to proceed in the manner pointed out by the 7th section of the 6 Geo. IV., which was general in its terms and applied to *all lands*, and not merely to lands returned by the Surveyor General.

It was submitted, therefore, that this Sunnidale lot was liable to sale, although not returned as described for grant; but it must be assumed that there was a due return made of the lot to the Treasurer, as it was the express duty of the Surveyor General to furnish his return every year, and the presumption was that a public officer would perform and had performed his duty; and as the land was actually granted by the Crown on the 23rd of July, 1841, the schedule for that year was the one which should have contained the entry of the lot as returned to the Treasurer; but the schedule for 1841 could not be found. There must have been one; and the fact that this lot had been assessed for that year, and for every year since, was evidence that the yearly schedule required to be furnished was in fact furnished. It appeared, and the presumption was, that it had since been lost, mislaid, or destroyed.

The Sunnidale lot, therefore, stood upon the same footing as the land in Nottawasaga, as to liability to sale, by reason of its having been returned by the Surveyor General as described for grant for the purposes of assessment.

The remaining objection to this lot was as to the time for which the taxes were in arrear. It was argued by the plaintiffs that no part of them had been in arrear for eight years, but, at the most, for seven years and a half. The patent issued in July, 1841: if the whole of the year 1841 were included as one of the eight years, the full period would be complete; but if any period less than that were

the only time to be counted, there would not have been the proper length of default to support the sale.

The case of *Doe d. Stata v. Smith*, 9 U. C. 658, was a decision that the rate for the whole of the year 1841 was rightly charged against the lot, although it did not become taxable till a portion of the year had elapsed; and if the land were chargeable, as the defendants contended, it was from the order in Council in May, 1834, or from the location of the lots on 14th October, 1840. Then they urged that the tax imposed in 1841 would relate back to the 1st January of that year, as the land would be assessable for the whole of that year, on the authority of the last cited case.

As to the notice of title set up by the defendants in *Stevens v. Jacques*, leave was asked to amend it, if necessary, on behalf of the defendants, Jacques & Hay, by setting out that the defendants claimed as well under the Sheriff's certificate granted on the sale for taxes; that so far as the other defendants, the Edinburgh Life Assurance Company, were concerned, no amendment was necessary, because they had set up their title by deed from them to defendants, Jacques & Hay, which permitted them to set up any prior title in favour of their vendors.

Leith, also, in the same case, argued that there should be a new trial, if the Court should decide against these defendants, solely on the ground that the Surveyor General's return for the year 1841 was not proved, to enable better evidence to be given of their having been such a return in fact, which it was believed could be given.

A. WILSON, J., delivered the judgment of the Court.

The exceptions which have been taken are of great importance to all who claim by a tax rate, and as such titles extend backward nearly forty years, and at least one million of acres must depend upon them, and as they have been the subject of descent, devise and sale, the interests of many persons must be involved in every decision respecting them.

There have been many objections taken, discussed and

settled during the period in question; but there is one which has been taken in these cases, and, as we believe, for the first time, which, striking at the root of every tax sale that rests upon a rate imposed before the General Assessment Act of 1850, invalidates every one of them.

The exception is that no Court of Quarter Sessions ever imposed a rate of any kind upon wild lands, but that the Treasurer, of his own motion, charged every wild lot one penny in the pound of its statutable value, under the idea that the Statute directly imposed that tax upon the land.

We would have been glad if there had been legislation on this subject, curing some of the irregularities and even illegalities which have been universal throughout every district and county of the Province, and which we should have thought would have been seen to have been necessary to prevent the enormous litigation and great injustice which must be done to those who have trusted to the Court of Quarter Sessions and other public functionaries performing their duties with accuracy, and where purchases made in good faith must be defeated, without any fault on the part of the purchaser, and without any merit on that of their opponent.

A common error may pass for law in some instances, and if the maxim cannot be adopted here, it is only because the rigid rule of law is against its application. But if an injustice be done, by giving effect to the law, in consequence of this common error, and if a right have arisen from the same common cause, it is just the case in which the Legislature might happily intervene to suppress the mischief and support the right.

The interference in such a case would probably be found to exclude in but very few instances the former owner, or those claiming by descent, devise, or *bond fide* purchase from him, or from his heir, devisee or vendee: in the greater number of cases it would most likely be found to operate against those only who are speculating on some defect discovered, or which they hope may be discovered in the course of litigation, and who have paid but little, if any

more, for the chance of the suit, than the persons whose titles they dispute have paid in taxes.

The former Statutes of maintenance and champerty might properly be re-enacted and enforced with full vigour against such persons; for they are in no sense entitled to legal favour, and all purchases made by them should be deemed to enure to the sole benefit of the tax purchaser.

There are different views which have been and may be taken in the construction of these Statutes. Should they be interpreted liberally for the protection of the purchaser, who buys in good faith at these public sales, or should they be construed rigidly, as Statutes of a penal nature, creating a forfeiture?

In the former case, many of their provisions may be considered to have been and to be directory, the omission to observe them, therefore, not avoiding the proceedings which are dependent upon them.

In the latter case these provisions would be deemed imperative and mandatory, nullifying every act done, if they were not strictly followed.

The decisions of our own Courts are, "that the authority given to the Sheriff upon certain conditions must be strictly pursued, or his conveyance cannot be valid. * * * The operation of the Statute is to work a forfeiture. * * * To support a sale, it must be shewn those facts existed which are alleged to have created the forfeiture, and which are necessary to warrant the sale; for a clerical error, or the wilful or negligent omission of a ministerial officer, should not deprive a man of his estate:" *Doe d. Bell v. Reaumore* (3 O. S. 243).

"The act is penal in its consequence, leading to a forfeiture. We are not at liberty to depart from the most obvious construction in order to give it a greater latitude of operation:" *Doe d. Bell v. Orr* (5 O. S. 433).

"In our opinion the directions of the Statute, as to what the Treasurer's warrant shall contain, are mandatory and imperative;" and this appears to be the opinion of the

Court as to the other directions of the Statute; particularly those relating to advertisements: *Hall v. Hill* (22 U. C. 582).

"This case adds one more to the long list of those in which sales for taxes have proved ineffectual, and have caused serious loss to purchasers, owing to the want of strict attention to the language of the Statutes on the part of the officers required to carry the law into execution:" *MacDonell v. Macdonald* (24 U. C. 80).

"The primary, it may be said, the sole object of the Legislature, in recognizing the sale of land for arrears of taxes, was the collection of the tax. The Statutes were not passed to take away the lands from their legal owners, but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay by a sale of a sufficient portion of their lands:" *Payne v. Goodyear* (26 U. C. 451).

"The Act was passed to give effect to a proceeding of a penal character, by enforcing a forfeiture of a party's land, unless he redeemed, and a strict compliance with the provisions intended for the protection of the original owner should be enforced:" *Williams v. Taylor* (13 C. P. 223).

In *Townsend v. Elliott* (12 C. P. 235) and *Laughtenborough v. McLean* (14 C. P. 180) the Statute was also considered as creating a forfeiture by the sale of the land.

In *Allan v. Fisher* (13 C. P. 70), the Chief Justice [Draper] said: "I certainly shall not willingly do anything to increase the stringency of the Act by construction, or to help speculators to buy lands for, perhaps, not a tenth of their value, by treating the realization of the tax as an object of such paramount importance as to over-ride all considerations in favour of those whose property is thus sacrificed; but at the same time I cannot, in their favour, overlook or disregard the plain effect of the Statute and the probable intention to make the purchaser at the Sheriff's sale safe in his purchase after the year for redemption has expired;" and upon this the neglect of the

collector to look for a distress on the land, or to make one, though he could have done so, or to enquire for the address of the party assessed, or to transmit a statement to him by post, or the omission by the township Treasurer to furnish the county Treasurer with a correct copy of the collector's roll, were held not to be such omissions as to avoid a sale of the land, and he adds: "Nor ought it, I think, to be held that for want of an act done, though required by law, where there has been no error or mistake, the result of such nonfeasance, all subsequent proceedings, in which third parties have acquired an interest, are to be deemed illegal."

The general effect of these decisions is that the Statutes are of a penal nature, and that their operation is to create a forfeiture of the lands sold.

The question is, whether this is the true character of the Statutes.

A "*forfeiture*" is defined by Blackstone to be (2 Com. 267), "A punishment annexed by law to some illegal act or negligence in the owner of lands, whereby he loses all his interest therein, and they go to the party injured as a recompense for the wrong, which either he alone, or the public together with him hath sustained."

It may arise from alienation contrary to law, as in Mortmain; or by particular tenants conveying [so far as they can] larger estates than they have the power to grant; or by non-performance of conditions; or by waste. An office may be forfeited by neglect of duty or misconduct; or forfeiture may accrue by conviction for crime, for smuggling, and from other causes.

A tax sale of land is not so penal a proceeding as the sale of one man's land, without notice to him, on a judgment recovered against another, as is constantly done when the land of the heir or devisee is sold on a judgment recovered against the executor or administrator; nor is it more penal than the sale of a ship for wages, or other maritime charge.

The tax sale is like the sale of the ship, a proceeding *in*

rem; but it is entitled to be regarded with more favour, for taxes are a charge due to the public: every one is interested in their being punctually paid by the person liable; for what he does not pay, they must make up for him.

The owner must be a defaulter for many years before his land can be sold: the sale is made to satisfy his debt, and even after the sale he may redeem his land within three years, by payment of the dues upon it and the small charge superadded for the purchaser.

The property is not retained by or transferred to the municipality, but is sold in open market to the highest bidder. This does not seem to have any of the characteristics of a *forfeiture*. It is more, if not exactly, like a sale by execution.

When private property is taken for the public benefit, or pulled down, to prevent the spread of fire, or is taken by a railway company, or other body, or persons, under Act of Parliament, it is not treated as a forfeiture.

Forfeiture is a term properly applied as descriptive of the specific deprivation of property: *Rex v. Skone* (6 East 614); though it may also apply in a sense to pecuniary fines or penalties: *The King v. Whitbread* (Doug. 549).

"A *tax* [is said to be] a portion, or the value of a portion of the property or labour of individuals taken from them by government and placed at its disposal. It would be superfluous to enter into any lengthened arguments to show the utility or rather necessity of raising a revenue for the use of the public. Hence the fundamental principle, that, in as far as practicable, all the subjects of a state should contribute according to their respective abilities to the sums required to maintain its fleets and armies, with the various functionaries and institutions necessary for defence, against hostile aggression, for the preservation of internal peace, the promotion of prosperity, and the protection of every citizen in the undisturbed enjoyment of his property and rights: *Maccullough* on Taxation and Funding, pp. 1, 2; *Bowyer's Universal Public Law*, 227-8-9.

The conclusion which I arrive at is that the Statutes

under consideration should not be construed as Statutes creating a forfeiture, but in like manner as the Statute by which lands are sold under execution for debt.

We should require strict proof that the tax has been lawfully made; but in promoting its collection we should not surround the procedure with too unnecessary or unreasonable rigour.

We should see that the law is honestly and fairly carried out, and that no injustice is done to the owner, or to the public; and that the claims of purchasers are properly maintained.

A substantial rather than a literal compliance with the provisions of the Statute will more equally, and quite fairly, protect all parties.

There are two cases which have very close application to the present one, which it may be well to state. They were in respect of sales of land for non-payment of the Sewer Rate, under the 23 Hen. VIII. ch. 5. One of the cases is in March, 123, pl. 202: "A *certiorari* was directed to the Commissioners of Sewers, who, according to the writ, made a certificate to which divers exceptions were taken by Saint John, the King's solicitor:

1. It appeared not by the certificate that the Commission was under the Great Seal, as it ought to be.

2. The certificate doth not express the names of the jurors, nor shew that there were twelve sworn who made the presentment, but only "*quod præsentatum fuit per juratores*;" so that there might be but two or three. [In fol. 198, Heath, J., said this was adjudged a good exception.]

3. It appears by the certificate that it was presented by the jury that the plaintiff ought to repair such a wall, but it is not shewn for what cause, whether by reason of his lands, prescription, or otherwise.

4. They found that there wants reparation, but doth not shew that it lies within the level and commission.

5. There was an assessment without a presentment, contrary to the Statute, for it is presented that such a wall

wanted repair, and the Commissioners assessed the plaintiff for reparation of that wall and another, for which there was no presentment.

6. The tax was laid upon the person, whereas by the Statute it ought to be laid upon the land.

7. There was no notice given to the plaintiff, which, as he conceived, ought to have been, by reason of the great penalty which follows for non-payment of the assessment: for by the Statute the land ought to be sold for want of payment.

Lane, the Prince's attorney, took other exceptions:

1. Because they assess the plaintiff upon information; for that they say they are credibly informed that such a wall wanted the reparation, and that the plaintiff ought to repair it, whereas they ought to have done it upon presentment, and not upon information or their private knowledge.

2. That they assessed the plaintiff, and for non-payment sold the distress, which by law they ought not to do, for that enables them only to distrain; if sale of distress be allowed, then that privilege [replevin] given by Parliament would be taken away.

Keeling, of the same side, said it was adjudged in this Court in Hunger's case, that the certificate of the Commissioners was sufficient, because it was not shewn the commission was under the Great Seal, and the Judges then in Court, Mallet, Heath, and Bramston, strongly inclined to many of the exceptions, but chiefly to that; but day was given to hear counsel of the other side."

The other case is *Brown v. Hammond* (2 Ch. Cases, 249): "The plaintiff set forth he was seised of three hundred acres of land in the fens, which he demised to Allison at £50 rent for two years, and after at £60 rent: lessee covenanted to pay all taxes. £30 was imposed, and £3 penalty incurred. The lessee, having sufficient in his hands to pay the £33, combined with the defendant, one of the Conservators, to defeat him of his inheritance, and forbore to pay the £33. The official appointed to sell by

the law of the fens sold 100 acres of the 300 for the £33, to the defendant, a Commissioner, whereas the 100 acres were worth £400 to be sold.

Defendant denied combination, and pleaded to the rest the Statute of Draining, and that the sale was made according to the Statute.

The Lord Chancellor allowed the plea, for he could not relieve contrary to Act of Parliament, and if he should, it would destroy the whole economy of the preservation of the fens, and compared it to the case of a mortgagor of houses in London, of great value, that should be settled by the Judges according to those Acts made concerning London to be rebuilt: this Court shall not examine any sale on pretence of equity..

NOTE.—The sale is made four months after default of payment twice in the year, and their use is to expose, first, ten, or fewer, or more acres, for the sum in arrear, and to increase till a chapman offer, and never sell for more than what is in arrear of the tax, and penalty, and it seems can sell for no more.”

These cases shew that it is the necessary accompaniment of every tax sale to be subjected to many exceptions, and to have them taken at every stage, and in every form, and that it is no new thing to have land sacrificed on such occasions, and that the Court should not, on pretence of equity, relieve against the sacrifice, because of the Act of Parliament, “for it would destroy the whole economy of the preservation of the fens.”

The maxim in the United States, where tax titles are strictly construed [*Blackwell* on Tax Titles, 52-61; *More v. Brown*, 4 Maclean, 219] is, that a tax deed is *prima facie* void: *Blackwell*, 35; *Minor v. The President and Selectmen of Natchez* (4 Smedes & Marshall, 628); and the sacrifice has been so invariable, and apparently so unavoidable, that *acres for cents* is a common expression for tax land purchases: *Blackwell*, 52-61; *Hughey v. Horrell* (2 Hammond, 231). In *Brattan v. Mitchell* (1 Watts & Sargent 310, in 1822) there were 390 acres sold for 355 cents.

I have not felt satisfied to dispose of the cases under consideration without a full examination of the decisions in our Courts affecting such sales. I have therefore abstracted them in a form convenient for my own reference.

The points which have been decided are to the following effect :—

1.—*The Surveyor General's, or the Commissioner of Crown Lands' List.*

The Surveyor General's Schedule is made by the Act the very foundation of the whole proceeding: *Doe d. Upper v. Edwards* (5 U. C. 598).

The land to be sold by the Sheriff should be stated in the list to have been described as granted or let to lease: *Doe d. Bell v. Reaumore* (3 O. S. 243); *Doe d. Bell v. Orr* (5 O. S. 433).

Land returned in June, 1820, for assessment, liable for the taxes for the whole of that calendar year: *Doe d. Slater v. Smith* (9 U. C. 658).

Land not contained in the list is not liable to assessment or sale: *Peck v. Munro* (4 C. P. 363).

The list may be shewn to be erroneous: *Perry v. Powell* (8 U. C. 251); *Street v. County of Kent* (11 C. P. 255).

Land held by the Crown Land Agent's receipt, and not by patent, lease, or license of occupation, and not occupied, is not liable to assessment, though returned by the Commissioner of Crown Lands as land to be assessed under the 16 Vic. ch. 182, sec. 48: *Street v. County of Kent* (11 C. P. 255); *Street v. County of Simcoe* (12 C. P. 284); *Street v. County of Lambton* (12 C. P. 294).

2.—*Assessment of Lands.*

A whole lot, returned by the Surveyor General as a single lot, must be assessed as one lot, though half of it may be in one concession and half of it in another: *Doe d. Upper v. Edwards* (5 U. C. 574).

On a grant of three several lots, each lot must be separately assessed, and a sale of part of the whole block for

arrears of taxes due on one lot is void; so also is the sale of part of one lot for the arrears due upon two: *Munro v. Grey* (12 U. C. 647); *McDonald v. Robillard* (23 U. C. 105); *Laughtenborough v. McLean* (14 C. P. 175); *Ridout v. Ketchum* (5 C. P. 50); *Black v. Harrington* (12 Grant, 195); *Christie v. Johnston* (12 Grant, 534); *Morgan v. Quesnel* (26 U. C. 544).

If the Treasurer can take notice of land as liable to assessment, though not contained in the Surveyor General's list, he must take notice of the particular part of the lot so granted, and apply the payments made to him on such part: *Peck v. Munro* (4 C. P. 363).

A non-resident can be rated in his own name only at his own request: *The Municipality of Berlin v. Grange* (5 C. P. 211), affirmed in appeal.

The ten per cent. on arrearages is to be added to the whole amount due on the land, and not merely on the amount of each year's assessment: *Gillespie v. The City of Hamilton* (12 C. P. 426).

Whether land erroneously assessed as non-resident land, when it was in fact occupied land, can be properly assessed as non-resident land, or can be legally sold: *Allan v. Fisher* (13 C. P. 63).

On a grant of the whole lot, where the east-half had been assessed separately, it might be assumed the taxes on the west-half had been paid, and that the east-half had been properly assessed by itself: *Allan v. Fisher* (13 C. P. 63).

An assessment of so much per acre, in place of on the assessed value, is illegal under the 4 & 5 Vic. ch. 10: *Doe d. McGill v. Langton* (9 U. C. 91); *Williams v. Taylor* (13 C. P. 219).

3.—*The Treasurer's Return of Lands in Arrear for Taxes.*

Proof must be given of a return having been made under 6 Geo. IV. ch. 7, sec. 6, and the 9 Geo. IV. ch. 3, sec. 9, of the land in question having been the proper time in arrear for taxes: *Doe d. Bell v. Reaumore* (3 O. S. 243).

The books of the Treasurer shewing land to be in arrear are sufficient proof of the fact of arrear.

Quære, if warrant alone would not be sufficient: *Hall v. Hill* (22 U. C. 578). See 2 Error and Appeal, 569.

And that the taxes were in fact in arrear, and for the proper time: *Ibid*; *Doe d. Upper v. Edwards* (5 U. C. 594); *Doe d. Sherwood v. Mattheson* (9 U. C. 321); *Harbourn v. Boushey* (7 C. P. 464); *Errington v. Dumble* (8 C. P. 65); *Allan v. Fisher* (13 C. P. 63); *Meyers v. Brown* (17 C. P. 307); *Jones v. Bank of Upper Canada* (13 Grant, 74).

An extract from the Treasurer's book, shewing the taxes to be unpaid, is not sufficient evidence of that fact: *Munro v. Grey* (12 U. C. 647).

4.—*Writ to sell.*

Must be under the seal, as well as the signature, of the proper officer, and if not sealed all sales made under it are void: *Morgan v. Quesnel* (26 U. C. 539).

It must be founded on the Treasurer's return, when the return was required: *Doe d. Bell v. Reaumore* (3 O. S. 243); *Errington v. Dumble* (8 C. P. 65).

A mistake in representing the taxes as due from 1st of July, 1820, to the 1st of July, 1828, in place of from the 1st of January to the 1st of January of these years, is not important, the taxes being in fact due for the full period of eight years: *Doe d. Stata v. Smith* (9 U. C. 658).

A writ issued in 1837, and postponed by the 1 Vic. ch. 20, was properly acted on in 1839, and did not lapse: *Todd v. Werry* (15 U. C. 614); *Hamilton v. McDonald* (22 U. C. 136).

The omission to distinguish in the writ whether the lands were patented, or under lease or license of occupation, is fatal to it and to the sale: *Hall v. Hill* (22 U. C. 578, affirmed in 2 Er. & App. 569).

Describing the lands in the writ as "all patented" is sufficient: *Brooke v. Campbell* (12 Grant, 526).

Describing the lands to be sold in a schedule which is

incorporated with the warrant, so as to be a part of it, is sufficient: *Hall v. Hill* (22 U. C. 578).

The writ should shew the particular land that is to be sold: there being confusion and doubt in this respect will avoid the sale: *Townsend v. Elliott* (12 C. P. 217).

If the identity can be established it will answer: *McDonell v. Macdonald* (24 U. C. 74).

The writ can issue only after the full period is past for which the land can be sold: *Kelly v. MacKlem* (14 Grant, 29).

When new county created, and taxes become due to it, and taxes are also and were due before the separation, the writ to sell goes to the Sheriff of the new district to sell for the arrears due both counties: *Doe d. Mountcashel v. Grover* (4 U. C. 23).

5.—Distress.

It must be shewn in sales under the earlier acts that there was no sufficient distress on the premises: *Doe d. Bell v. Reaumore* (3 O. S. 243); *Doe d. Upper v. Edwards* (5 U. C. 594).

The Sheriff was not obliged to look for a distress on the land between the time he first offered the land for sale and the time when the adjourned sale was held, and a distress in fact being on the land between those two periods did not defeat the sale: *Hamilton v. McDonald* (22 U. C. 136).

The 13 & 14 Vic., ch. 67, did not require the Sheriff to search for goods and chattels, as a distress, before selling the land, the duty of distraining, if there be a distress, being thrown on the collector: the warrant simply requires the Sheriff to sell: *McDonell v. Macdonald* (24 U. C. 74); *Allan v. Fisher* (13 C. P. 63).

6.—Advertisement.

The omission to advertise the intended sale of lands in the county local paper, the advertisement being regularly published in the official *Gazette*, does not invalidate the

sale : it does not on common law principles avoid a sale of lands under execution : *Jarvis v. Brooke* (11 U. C. 299).

The omission to advertise lands in the local paper, for the purpose of giving effect to the sale under the special provisions of 16 Vic. ch. 183, secs. 7, 8, which required the advertisements to be in the *Official Gazette*, and in a newspaper of the county, was held to avoid the sale.

"The omission of either of these advertisements interposes an insuperable obstacle to the application of the remedial portion of the Act in favour of purchasers at such sales :"
Williams v. Taylor (13 C. P. 219).

The case of *Hall v. Hill* (22 U. C. 578) is opposed to the decision of that Court in 11 Q. B. 299 in this respect ; and in *Hall v. Hill* the Court said the decision of *Williams v. Taylor*, "though under a different Statute, was upon a case very analogous in principle ; and if it were necessary for the decision of this case, we should, as at present advised, arrive at the same conclusion."

The publication in the *Canada Gazette* for thirteen weeks, from and including the 1st of August to and including the 24th of October, 1857, though not an advertisement for three months, which would have required the advertisement to be continued till and to include the 31st of October, did not render the sale invalid : the Statute was directory in this respect, and the partial omission was an irregularity.

This was the decision of the Chancellor, over-ruling the opinion of the Referee of titles. The matter is now in appeal from the Chancellor's judgment : *Douglas v. Connor*.

7.—Sale.

The sale of part of a whole lot, which lay in two concessions, for arrears alleged to be due upon one-half, was illegal, because there was no such distinct half to be assessed : the assessment should have been on the whole lot : *Doe d. Upper v. Edwards* (5 U. C. 594) ; *Munro v. Grey* (12 U. C. 647). See also *McDonald v. Robillard* (23

U. C. 105); *Laughtenborough v. McLean* (14 U. C. 175); *Ridout v. Ketchum* (5 C. P. 55); *Black v. Harrington* (12 Grant, 175); *Christie v. Johnston* (12 Grant, 534).

A sale for a total charge of £5 11s. 8d., of which only £1 8s. had been legally imposed, was held to be void *in toto*: *Doe d. McGill v. Langton* (9 U. C. 91); *Irwin v. Harrington* (12 Grant, 179).

The good rates being separable from the bad rates, *Held*, not to defeat a distress *in toto*: *Corbett v. Johnston* (11 C. P. 317).

See the observations of Draper, C. J., in *Townsend v. Elliott* (12 C. P. 224) and *Allan v. Fisher* (13 C. P. 72), doubting whether the sale of lands would be wholly defeated, but conceiving he was bound by the decisions he mentioned.

A sale of land described as granted, will prevail against the subsequent patentee: *Charles v. Dulmage* (14 U. C. 585); *Ryckman v. Van Voltenburgh* (6 C. P. 385).

A purchase made in April, 1839, but not carried out by the purchaser, would have authorized the Sheriff to adjourn the sale: *Todd v. Werry* (15 U. C. 614).

At an adjourned sale the whole lot should not be offered for sale, but only as much of it as is sufficient to cover the taxes: *ibid.*

The Sheriff must be presumed to know whether a whole lot of land of 200 acres was worth £500 or only £2 12s.: *Henry v. Burness* (8 Grant, 345).

A purchaser procuring the whole lot to be knocked down to him, by requesting the by-standers not to bid against him, as he wanted to confirm his title by purchasing it in, acted improperly, and the sale so conducted was held void: *Todd v. Werry* (15 U. C. 614).

A combination to defeat fair bidding will vacate the sale: *Henry v. Burness* (8 Grant, 345).

The writ to sell was delivered to the Sheriff when in office: he did not sell till he was out of office: the sale was held invalid, as it was not shewn the Sheriff, while in office, had begun to act on it, and *quære*, if the same rule

applied to such writs as to writs of execution: *McMillan v. McDonald* (26 U. C. 454).

Whether land, improperly assessed as non-resident land, when it is in fact occupied land, can be legally sold for arrears: *Allan v. Fisher* (13 C. P. 63).

Sale by the Sheriff good, though there is a distress on the land: *Ibid*; *McDonald v. McDonald* (24 U. C. 74).

When taxes are due to an old district, and taxes become due to the new district after separation, the sale for both arrears is to be made by the Sheriff of the new district where the land lies: *Doe d. Mountcashel v. Grover* (4 U. C. 23).

8.—*Payments.*

A payment of taxes to the Sheriff, while he had the warrant to sell, is good: *Doe d. Sherwood v. Mattheson* (9 U. C. 321); *Jarvis v. Cayley* (11 U. C. 282); *Jarvis v. Brooke* (11 U. C. 299).

After the sale of a whole lot for taxes, the Treasurer may receive payment of the taxes in redemption of a part of it, if the lot had been in fact sub-divided, and the Treasurer determined in good faith that such part was a distinct sub-division: *Payne v. Goodyear* (26 U. C. 448); *Brooke v. Campbell* (12 Grant, 526).

If the Treasurer can take notice of land granted, though not returned as such, he must take notice of the particular part of the lot so granted, and he must apply the payments made to him on the part so granted: *Peck v. Munro* (4 C. P. 363).

See also as to payment *Allan v. Hamilton* (23 U. C. 109).

9.—*Description of Lands.*

The Sheriff's deed described the land sold as "eighty-nine acres of the south part of twenty-five in the second concession of the Township Charlottenburgh:" it was held insufficient, for want of the proper boundaries defining the precise locality: *McDonell v. McDonald*, (24 U. C. 74). See also *Cayley v. Foster* (25 U. C. 405); *Knaggs v.*

Ledyard (12 Grant, 320); *Fraser v. Mattice* (19 U. C. 150); *Catley v. Foster* (25 U. C. 405).

A description of thirty acres of lot 15, in the seventh concession of Osnabruck, *to be measured according to Statute*, "is sufficient under the 6 Geo. IV. ch. 7, sec. 13, the Sheriff not having exercised the option under the 7 Wm. IV. ch. 19, sec. 5, to sell otherwise than according to the first Statute: *Frazer v. Mattice* (19 U. C. 150); *McIntyre v. The Great Western Railway Company* (17 U. C. 118).

10.—*The Deed.*

Lands were sold under the 6 Geo. IV. ch. 7, but no deed was made of them while the act was in force: it was held a deed could not be made after the repeal of the Act, as no provision was made for such a case: *Bryant v. Hill* (23 U. C. 69).

The like decision was pronounced as to sales made under the 13th & 14th Vic. ch. 67: *McDonald v. McDonell* (24 U. C. 424).

As to the sufficiency of the description of lands mentioned in the deed, see the cases above stated.

Deed may be made by successor of Sheriff who sold: 27 & 28 Vic. ch. 2, sec. 43; and as to registration see 29 Vic. ch. 24, sec. 57, and Statutes of Ontario, ch. 20, secs. 58, 59.

The first objection is, that there was no assessment made on the lands in question for which they were sold.

The only acts done towards an assessment are detailed in the evidence of Mr. McDonald, the Treasurer for the County of York, and Mr. Lally, formerly Treasurer for the County of Simcoe, and they may be stated as follows:—

"When the owner came to pay the taxes, the practice was to make up the amount to that time, and to receive that amount, which was then marked in the book as paid for the respective years for which the payment was made. There was no assessment roll. The amount of tax was not entered in the book, but a blank was left opposite each

year until the taxes were paid, and then there was entered in the book, under the years for which the payments were made, the word 'paid,' and the folio of the cash-book in which the entry was made."

There were some difficulties in assessing and rating lands under the 59 Geo. III. ch. 7, when the lands were not contained in the assessment roll, that is, the lands of persons who were not residents of the township.

The Court of Quarter Sessions was not to raise more money than was required "for defraying the public expenses of the District;" and this by sec. 7 was to be apportioned among those "who were named in the rate roll," which did not include the non-residents.

There was no express power given to rate lands, which were not in the assessment roll; yet the Legislature assumed that these lands were to be assessed and charged to the payment of the rates or taxes imposed by this Act. But, by assessing them, the Court of Quarter Sessions would be receiving more money than was required for the public expenses of the District, by the amount of this non-resident tax; and, if assessed, to what extent and for what purpose were they to be assessed?

All the money that was required for the public expenses of the District was to be raised from the properties of residents. What was there left to be provided for? And how was the rate, and what rate was there, to be ascertained and imposed?

I cannot perceive how the rate was to be estimated, because I cannot perceive what amount or what precise amount was to be raised by it.

Such lands were not looked to as the fund from which the immediate yearly income was to be derived. Nothing might be got from them for years, and then only in uncertain sums.

In my view of the Statute, such lands could not be assessed beyond the statutable rates.

The Statute imposed no particular rate on wild lands: the maximum was one penny in the pound; but the actual

rate was to be only such sum as the Court of Quarter Sessions expressly fixed, not exceeding the penny in the pound.

Now, the facts shew that the Court of Quarter Sessions never assessed these lands at all in any form whatever, but that the Treasurer left certain blank columns in his book for certain years, and charged of his own authority, at indefinite times, the maximum charge of one penny in the pound, under the idea that the Statute had imposed that sum, which was generally known as the *wild land tax*, on all lands, and that it required no act or discretion on the part of the Court of Quarter Sessions to impose or to regulate it.

All the other years, after the first year now in question, 1841, were regulated by the 4 & 5 Vic. ch. 10; but no change was made in the mode pursued of assessing or charging the taxes upon these lands.

Under these circumstances it appears to me the first objection is too conclusive to be removed: the Court of Quarter Sessions never imposed any rate whatever, neither the penny in the pound nor any lesser rate.

If it be doubtful how much was to be assessed against non-residents, there is no doubt that the only authority to lay it on, whatever it was, was the Court of Quarter Sessions.

The method adopted of leaving the columns of years in the Treasurer's books in blank, and filling in what is called the statutory tax, of one penny in the pound, when the owner came after the lapse of years to pay what he supposed was rightly chargeable against him, is no more a compliance with the provisions of the Act, than if the High Constable had done the same thing in his official book.

It is not possible to support a sale against such an objection, and yet it is singular it is the first time it has ever been taken; but, taken now, it appears to us to be fatal.

The law requires clear demonstration that a tax is lawfully imposed: *Burden v. Veley* (12 A. & E. 233); *Denn v. Diamond* (4 B. & C. 243); *Gosling v. Veley* (17 Jur. 929).

Where the Council of a Borough made a sale of sixpence in the pound, and the overseers, who were appointed to levy it, made it sevenpence in the pound, the sale was held to be void, because made "without any power:" *Reg. v. Mayor of New Windsor* (7 Q. B. 908).

So, a rate made by Commissioners of Sewers, without the presentment of a jury on which to found it, is void: *Wingate v. Wait* (6 M. & W. 739); *Taylor v. Loft* (8 Ex. 269). See also *Rex v. Croke* (Cowp. 26); *Bratton v. Mitchell* (1 Watts & Sargent, 310).

The first objection, however the others are determined, must decide both cases: the sales are void.

The second objection is, that, although the lands were liable by the 59 Geo. III. ch. 8, to the one-eighth of a penny per acre, and although the sales were made to satisfy that charge, yet the sales are void, because they were made also for the illegal rates mentioned in the first objection.

This objection is plainly supported by the cases which were cited; but it will be seen that doubts were expressed in the cases before referred to, in 12 C. P. 224, and 13 C. P. 72.

This objection must also prevail.

The third objection is, that the Treasurer did not keep proper accounts with these lots according to the Statute, and the sales were therefore void.

No doubt he did not, but I do not think that would defeat the sale: some of the observations in *Allan v. Fisher* (13 C. P. 70-71) are to this effect.

This objection fails.

The fourth objection [the 5th objection in the rule], that part of the taxes for which the sales were made was due to the former Home District, while the sales were made by the Sheriff of the Simcoe District, to which District the

residue of the taxes was owing, and in which District the lands are situate, is not sustainable, upon the authority of *Doe d. Mountcashel v. Grover* (4 U. C. 23). See also 8 Vic. ch. 22, sec. 3.

The fifth objection [the sixth in the rule] is, that the Treasurer did not advertise the list returned by him to the Court of Quarter Sessions within one month after his return was made, nor did he advertise it in the *Gazette* at all.

The answer made is, that this defect is cured by the 22nd section of the 6 Geo. IV. ch. 7, and that such an omission would not avoid a sale on execution, and it should not therefore defeat a tax sale.

I think this objection healed by the Statute referred to, under which Statute the sale was made; and I also think the same rule, which applies to sales by execution, should govern tax sales: there cannot and there should not be any substantial difference between them.

From the case of *Doe d. Moffatt v. Hall* (Taylor's R. 725), where Mr. Justice Sherwood said, "The Statute requiring the Sheriff to advertise the lands before he sells them is clearly directory, and a failure in this part of the Sheriff's duty cannot affect an innocent purchaser by any existing legal principle," down to the case of *Paterson v. Todd* (24 U. C. 296), in which Draper, C. J., said, "There is no decision that a Sheriff's sale under execution of land is invalid by reason of defective advertisements: * * * we think we ought not, by a decision given for the first time after so many years, to deter purchasers, at Sheriff's sales, by holding it to be their duty to examine into every step of the Sheriff's proceedings under a valid writ, supported by a valid judgment,"—the decisions have been uniform that a strict observance of the Statute, as to publication of the intended sale, is not required to support it when made under an execution. *Osborne v. Kerr* (17 U. C. 134) is to the same point.

In *Cole v. Green* (6 M. & G. 872) Tindal, C. J., said, "The Statute says that contracts *shall* be signed by the

Commissioners, or by any three of them, or by their clerk. It does not say they shall be void unless so signed. It appears to us, therefore, this latter part of the Statute is directory only ;” and he also said that that appeared to be the proper construction, for it was also provided that a certificate of all such contracts *shall* be kept in a book, and it would not be supposed that all contracts were to be void because copies had not been duly made of them by the clerk ; yet, if the Statute was to be held to be imperative in the one instance, it must be in the other also.

In *The King v. The Justices of Leicester* (7 B. & C. 6) it was decided that a Statute, declaring the Michaelmas Quarter Sessions *shall* be holden in the week next after the 12th of October, was merely directory, and that the Sessions might, notwithstanding the enactment, be legally holden at another time. Lord Tenterden, C. J., said, “It has been asked what language will make a Statute imperative, if this Statute be not so ? Negative words would have given it that effect ; but those used are in the affirmative only.”

The requirements of the Statutes, which had to be followed with respect to these lands by the different officers, were to the following effect :

By the 59 Geo. III. ch. 7, the Treasurer *shall* keep an account with every lot or parcel of land, charging it with the taxes payable, and crediting it with the taxes on it ; and he *shall* produce the books of accounts, for the inspection of the Justices, at the Court of General Quarter Sessions in every year. The assessment, when in arrear for three years, *shall* be increased in a certain ratio ; and such increase *shall* be charged against the land in the accounts of the Treasurer.

The Clerk of the Peace *shall* transmit before the end of the month of January in each year, to the Governor, an aggregate account of the assessment.

By the 6 Geo. IV. ch. 7, the Treasurer *shall*, at the General Quarter Sessions next after the 1st of July in each year, present to the Justices an accurate account of all lands on which the assessments have been imposed

and are eight years in arrear. The Clerk of the Peace *shall*, upon such account, make out a writ for levying the assessments, which *shall* be directed to the Sheriff.

The writ *shall* be returnable at the third Quarter Sessions which shall ensue after issuing the same; and the Sheriff *shall* be directed to have the moneys he levies at the said Court, and the payment thereof to the Treasurer shall be a discharge to the Sheriff.

The Treasurer *shall* cause to be inserted in the *Gazette*, and in a local newspaper, a list of all the lots as returned by him in arrear, within one month after rendering his account.

The Sheriff *shall*, within one month after the receipt of the writ, insert a notice, &c.

No sale *shall* take place in less than six months from the delivery of the writ to the Sheriff, nor *shall* it be made out of the township where the land lies, unless, &c.

The sale *shall* be by public auction; and the amount of assessment in arrear *shall* be declared, &c.

The Sheriff *shall* expose to sale the several lots in the following manner, beginning at the front angle, &c.

When this mode cannot be adopted, it *shall* be in the discretion of the Sheriff to sell such part as he shall think most for the interest of the proprietor.

Nothing *shall* authorize a greater interest to be sold than the person assessed has.

On payment by the purchaser of the money, the Sheriff *shall* give him a certificate, &c.

If the land be not redeemed, the Sheriff *shall*, on demand, make a deed.

Before the Sheriff *shall* deliver such conveyance, he *shall* deliver to the Registrar of the County a certificate of such sale to be registered.

The Registrar *shall* enter the same on record.

By the 7 Wm. IV. ch. 29, all sales *shall* be made in the town where the Quarter Sessions are held, on the second day of the Sessions, and *shall* be advertised accordingly.

The land *shall* be put up at the upset price of 2s. Cd.

per acre, and only so much *shall* be exposed for sale as will at such price produce the amount required; and if no sale made, the Sheriff *shall*, without a new writ, expose the same at the next Court of Quarter Sessions.

The Sheriff *shall*, within one month after each sale, make out a general return of the lots sold, the time of sale, the amount for which sold, and the name of the purchaser, and transmit the same to the Registrar of the Province, to the end that ready means of reference may be afforded at some one public office where information respecting all lands sold may be acquired within the period for redemption.

Now, all of these requirements cannot be of the like imperative nature, nor be so imperative that the non-observance of any one of them shall avoid the sale.

Suppose the Treasurer has not kept an account in his books, with the lot, of the taxes due on it, or has not produced it yearly to the Justices, or has not added the increase to the arrears; or has not at the Quarter Sessions next after July presented to the Justices an account of the arrears due on the different lots; or did not, within one month after rendering his account, advertise the lands liable to be sold;—are these, or any of these, omissions to defeat the Sheriff's sale? If not, is the omission to advertise in the *Gazette*, or in the local paper, advertising only in one of them, to defeat it? No doubt the argument may be pressed further, and it may be asked, is the Treasurer's neglect to advertise at all to deprive the owner of his land? A total neglect may have a different effect from a partial neglect. The omission to advertise for one day of a certain period would be a very different thing from an absolute neglect to advertise at all. Neither of these extreme cases can well be supported, when the objection is taken.

So, it may also be asked, will the Sheriff's neglect to advertise the land for sale within one month after he gets the writ, or to transmit the statement of the sales made to

the Registrar of the Province within one month after the sale, defeat the sale ?

If neglecting to do these acts within the specified time will not vacate the sale, why will the doing them in an imperfect manner defeat it ?

Under these Acts there are certain things which must be strictly adopted, otherwise the whole proceedings following them must be void.

There must have been an assessment in fact, and made by the properly authorized body ; the writ must be directed to the Sheriff, and be returnable at the time named ; the sale must not be made in less than six months after the delivery of the writ to the Sheriff ; it must be by public auction ; the amount of arrears must be declared at the time of sale.

These are essential elements in the constitution of every tax title. There must be a charge rightly created on the land. There must be a power conferred on the Sheriff to sell it. The sale must not be without some reasonable and sufficient notice, nor sooner than he is authorized to sell, nor otherwise than by public auction.

I do not conceive that greater strictness is required, nor is it expedient to demand it.

I do not forget that *shall* is to be construed as imperative. I think this is a case in which "there is something in the context or other provisions of the Act indicating a different meaning or calling for a different construction."

The cases of the *Queen v. Mayor of Rochester* (7 E. & B. 924, affirmed E. B. & E. 1024) and *Hunt v. Hibbs* (5 H. & N. 123) shew how far the Courts will proceed to enforce the performance of public duties, "where the Act is required to be done for the public good and a serious inconvenience will arise from its not being done." The like principle requires that these public tax sales should be supported if it can reasonably be done.

The rule in the United States is, that the Statutes, under which these sales are made, are to be construed very strictly, and the sale will be void unless the pub-

lications are fully and strictly made; for they are there considered to be "indispensable preliminaries to a valid sale:" *Thatcher v. Powell* (6 Wheaton, 119). See also *Kellog McLaughlin* (8 Ohio R.) and *Blackwell* on Tax Titles, *passim*.

I do not think the objections to the alleged imperfect advertisement should be judged with greater strictness than in cases of sales by execution, and by the Statute 6 Geo. IV. the alleged irregularities are cured in the cases now under consideration.

The sixth objection [the 7th in the rule] is, that the Sheriff did not advertise the sale, and by advertising for a wrong day the sale was irregular and void.

The Sheriff, by the papers filed, advertised, first, in the *Gazette*, on the 13th of October, 1849, and continued to publish to and until the 9th of February, 1850. The next advertisement in the *Gazette* began on the 20th of April, 1850, and continued until the 1st of June thereafter, and the third advertisement in the *Gazette* was on the 11th of May, 1850, and continued until the 20th thereafter.

The first *Gazette* advertisement was the usual one, that the Sheriff would sell on the second day of the Quarter Sessions, in April 1850, at 2s. 6d. per acre, and on the second day of the Quarter Sessions, in July following, the remainder of the lands.

The second *Gazette* advertisement was published by the above notice being reprinted on the 20th of April, 1850, with the memorandum at the foot, "The above sale is postponed to first of July at the same place and hour."

The third *Gazette* advertisement was made by the first notice being reprinted without the memorandum at the foot of the second one. This third *Gazette* advertisement was no doubt inserted to cure the discrepancy in the second one, which in the body appointed a sale for the 2nd day of the Quarter Sessions in July, which was the 3rd of the month, and yet in the memorandum it was declared that the sale was postponed until the 1st of July.

This mistake might, perhaps, be read in this manner: The April sale stands postponed till the 1st of July, but the July sale, to take place on the 2nd day of the Quarter Sessions, will take place on that day.

As the 6 Geo. IV. ch. 7, sec. 22, was in force when these advertisements and sales were made, I think the not mentioning the lots to be sold, otherwise than by the reference to the same having "been duly advertised by the Treasurer of the said district, under date of the 16th of July, 1849," if it be a defect, was cured; and that the advertisement for 13th October, 1849, to the 9th of February, 1850, not properly continued till nor connected with the second advertisement on the 20th of April, or, if this second advertisement be entirely omitted, with the third advertisement on the 11th of May, 1850; and that the note of postponement, at the foot of the second advertisement, taken in connection with the body of the advertisement, but more particularly with the third advertisement which omits the objectionable note,—are also such matters as were cured by that Act.

No objection was taken as to any omission or defect of publication in the local paper.

The seventh objection [the eighth in the rule] is, that the Sheriff sold the whole of the lots while he should have sold only a portion of them.

No facts are brought out sufficient to defeat a sale of the whole lot, as are mentioned in *Todd v. Werry* (15 U. C. 614), and we do not construe the Acts as excluding a sale of the whole lot, if, everything being fairly and reasonably conducted, a sale of the whole lot is necessary.

To avoid a public sale of lands, on the mere ground that too much land was sold for too small a sum, is a very dangerous cause of interference, and is contrary to the case above cited; "examining a sale on pretence of equity" and "giving relief contrary to an Act of Parliament."

In *Callis on Sewers*, 186, it is said that a sale in fee for a sewer rate, which might be satisfied by a sale for years,

was not by the facts allowed. Still, I think, the objection is not established and fails.

The eighth objection [the ninth in the rule] is, that the deed was made after the repeal of the Acts under which the sales were made, and is therefore void. *Bryant v. Hill* (23 U. C. 96) is a conclusive decision in favour of this objection, which we of course follow, without expressing any opinion of our own upon it, as we are bound by it. The argument on the Sheriff's certificate in *Stevens v. Jacques* is given below.

The ninth objection [the tenth in the rule] is, that the sales, having been made after the return day of the warrant, were void.

I think this is not a good objection.

A sale, made under a common law execution, after the expiry and return of the writ, founded on a seizure while the writ was in force, has always been deemed a good execution of the writ.

If, after the Sheriff has seized goods, they remain in his hands for want of buyers, "that is not a discharge of the writ, but only an excuse that he has not the money, and he is compelled by law to bring it in:" *Clerk v. Withers* (6 Mod. 299); and this is very applicable to the writ of the Treasurer.

The writ, which issued under the 6 Geo. IV. ch. 7, was to be returnable at the third Quarter Sessions after it issued; and no sale was to take place in less than six months from the time of *delivering the writ to the Sheriff*: section 11.

Now, the Sheriff might not have had the writ six months in his hands before the time within which it was returnable had expired. The Sheriff had also the power to adjourn the sale, and he might therefore adjourn beyond the return day: section 16.

Then, under the 7 Wm. IV. ch. 19, if the lands should not sell at 2s. 6d. per acre, which was at the first sale, the Sheriff was without *any new writ* to make another sale at

the next Court of General Quarter Sessions, which occurred "after the expiration of the six months' notice required by law." See also 3 Vic., ch. 46, sec. 6.

This objection, I think, fails.

The tenth objection [the fourth in the rule] is, that the taxes were not in fact eight years in arrear when the Treasurer made his return to the Quarter Sessions.

This objection applies only to the case of *Stevens v. Jacques*.

There was an order in Council passed on the 1st of May, 1834 in favour of Alexander Stevens, as the son of a U. E. L., and he was located to it on the 14th of October, 1840. The land was assessed in 1841, and the patent issued on the 23rd of July of that year; but no return by the Surveyor General of this land having been granted, &c., can be found.

The absence of the return is not conclusive evidence that there was not a return; for in one case it was proved beyond all question, on a trial in which a patent was produced, that the Crown had previously granted the same land, for the prior patent was also produced, and yet there was no entry in the public offices of any such prior patent having been issued, and none was recorded.

Here, it is true, the earlier patent was produced, and so shewed conclusively that there had been such earlier grant in fact; while here the return is not produced, and so the want of an entry in the Crown Land Department is quite consistent and in plain accordance with the want of a return in point of fact. I am not prepared to say that, on the facts, it might not have been left to the jury to say whether they could presume a return to have been made or not. But suppose it could have been and had been left to them, and had been found in the defendant's favour, the fact still is, that the taxes were charged only from the 1st of July, 1841, and the Treasurer's return was of arrears, as they appeared to the end of the year 1848. Now, at that time there were arrears due in fact only for

seven years and a half, and unless it can be maintained that the last half-year of 1841 can be held to apply to the whole of that year, there were not eight years arrears of taxes due on this lot at the end of 1848: I think the effect of *Doe d. Stata v. Smith* (9 U. C. 658) is that the taxes imposed in the year are for the whole of that fiscal year.

In that case the Surveyor General's return was before the first of July; but I do not see what difference that makes, so long as it is made before the assessment is completed upon the lot, and no precise day was fixed by the Acts for making the assessment. When that was made it was to be considered as made for the whole of the calendar year.

The maxim *omnia præsumuntur* may be invoked here. The facts shew a fit case for its application. The patent issued on the 23rd of July, the land having been located in the previous October. The Government had, therefore, notice of the location before the time for making a return of the land for the year 1841 came round. Sometime also would necessarily elapse between the application for patent and its completion, probably more than twenty-three days. Then the land was assessed in fact that year, when it had never been assessed before. How could this happen, but by the fact of the land having been duly returned as described for grant? If, then, such a return cannot be found, may its existence not be presumed under these circumstances? I think it might.

It has not yet been determined whether land "holden in fee simple, or promise of a fee simple by land board certificate, order of Council, or certificate of any Governor of Canada, or by lease," would "be considered as ratable property" [59 Geo. III. ch. 7, sec. 4], which was *not* in the possession of "a resident inhabitant of the township:" section 3.

The whole objection turns on the correctness of the assessment for 1841, and whether that assessment can be extended to the whole of the year; and as to the first point, that depends on the fact of a return of the lot having been made by the Surveyor General, and this, I think, may

be presumed on the facts in this case; and as to the the second point, I think the assessment, when made, did apply to the whole of the year.

This objection, then, does not prevail.

It was argued in the case of *Stevens v. Jacques* that, although the Sheriff's deed was void under the eighth objection, the defendants were nevertheless entitled to the possession of the land by reason of the Sheriff's certificate; to which it was answered that this was not a ground of defence set up in the notice of title. But this, if necessary, we should allow even now to be added. I shall, therefore, consider this defence as having been specially set up, for the parties came here to contest the validity or invalidity of the tax sale and purchase in all its bearings, and in every particular, and the course of proceeding by the plaintiff's counsel, anticipating it in the argument, shewed the plaintiff was not surprised by this new defence.

By sec. 17 of the 59 Geo. III. the purchaser, on payment of the purchase money, was entitled to receive a certificate specifying the particulars of sale, under which he might "forthwith go into possession of the land bid off to him;" but the proprietor, by redeeming the land within twelve months from the time of the sale, "should be entitled to resume possession;" * * * and the right acquired [*required* in the printed Statutes] by such purchase shall thenceforth wholly cease and determine. And by sec. 18 it is provided that, if at the expiration of twelve months from the sale, the land is not redeemed, the Sheriff shall, on demand by the purchaser, his heirs or assigns, execute a conveyance to them, in fee simple, of the land.

There is nothing in the Statute requiring the purchaser to take possession within the period allowed for redemption. He may take possession forthwith, and the owner is never to resume possession unless and until he complete his right to it by redemption.

If the purchaser may by the certificate forthwith take possession, he must have the power to turn the owner or

other occupant out of possession; and if he may do this within the time of redemption, there is no reason why he may not do so after that time has gone by, so long as the certificate continues in force.

There is no period fixed for the determination of the certificate, though it must be avoided when a valid conveyance has been made; but the conveyance need not be made by the Sheriff until a demand has been made by the purchaser, his heirs or assigns, for that purpose; and until made the certificate must be a protection to the purchaser for the land that he has bought. I do not see, therefore, why the certificate should not be a good title, to maintain or to recover the possession, for the purchaser, his heirs or assigns, by the very words of the Statute, and according to the case of *Doe d. Bell v. Orr* (5 O. S. 433).

In this case, if no valid deed has been made, the certificate cannot have lost its efficacy, although it may have been returned to the Sheriff. The interest acquired or represented by it cannot have been lost by the delivery of the document back to the Sheriff, for it would not have been defeated by its cancellation, loss, or destruction.

The invalidity of the deed does not, therefore, in my opinion, defeat or affect the force of the certificate, or prejudice the right of the purchaser, or his assignee, to the possession of the land under it. I do not think anything turns on a part only of the land having been actually occupied: as a fact, the whole was occupied, as much so as land of this nature can be or ever is occupied.

The result is, that the plaintiffs in the two cases are entitled to succeed on the first, second, and eighth grounds of objection.

The defendants in the two cases succeed on the third, fourth, fifth, sixth, seventh, and ninth objections; and the defendants, in the case of *Stevens v. Jacques and others*, succeed also on the tenth objection, and on the question raised as to the sufficiency of title under the Sheriff's certificate.

Judgment accordingly.

BELL V. MCLEAN.

Sale for taxes—Non-resident land—Taxes not due for five years—Deed by Sheriff's successor—C. S. U. C. ch. 55, sec. 97—27 & 28 Vic. ch. 28, sec. 43.

The Collector's roll was delivered to him on 26th August, 1852, and the Treasurer's warrant, under which the Sheriff sold the land, which was non-resident land, for unpaid taxes, was issued on 11th August, 1857: *Held*, that, as under sec. 42 of the Assessment Act of 1853 (C. S. U. C. ch. 55, sec. 97), the taxes could not be considered due until one month after the Collector had received his roll, the taxes for that year were not due at the time the roll was delivered to him, and that therefore no portion being due for five years on 11th August, 1857, the sale was void.

Seemle, per A. Wilson, J., that the taxes of the preceding year, for the purposes of sale for arrears, are not to be considered as in arrear till after the expiration of the year in which they are imposed.

Seemle, that a deed, made by the successor of the Sheriff who made the sale for taxes, is good under 27 & 28 Vic. ch. 28, sec. 43.

EJECTMENT.

The titles of both parties were admitted.

The defendant claimed under a tax title, and it was admitted he was entitled to recover if the tax title was good in law.

The plaintiff took the following exceptions to it:

1. Taxes were not in arrear for five years when the warrant issued to sell the land.

2. The warrant described the land to be sold as *patented* without specifying for what kind of estate.

3. The notices of sale described the land in same manner.

4. Publication not made a sufficient time. The first advertisement was in the *Gazette* on the 22nd of August, 1857, and the last on the 14th of November, 1857. Statute of 1853, sec. 57 (C. S. U. C. ch. 55, sec. 128) required three months' publication. The first advertisement in the local paper [a weekly] was on the 26th of August, 1857, and the last on the 25th November, 1857.

5. The notices advertised a sale for the 1st December, and no adjournment appeared to have taken place, and the sale was made, not on the 1st, but the 3rd of December.

6. The Sheriff's deed did not describe the land by boundaries, but simply as the west-half of the lot.

7. The whole west-half should not have been assessed together, as three acres of it had been sold separately from it.

8. The land was sold by Sheriff Moodie, and the deed should have been made by him, whereas it was made by his successor, Sheriff Taylor, who had no authority to make it.

9. The sale was in 1857, yet no deed was given till 1865, and no registration of such sale was made, while the plaintiff claimed by a connected registered title traceable from the Crown, one of which registrations was since 1857, that is, on the 27th of February, 1865, while the Sheriff's deed was not made till the 14th, and registered on the 15th, of March, 1865; and the plaintiff had no notice of such Sheriff's sale, or Sheriff's deed.

The verdict was entered in the plaintiff's favour, with leave to the defendant to move to enter the verdict for him, in case the Court should be of opinion that the objections so taken were not entitled to prevail.

In Easter Term last, *Wallbridge*, Q. C., obtained a rule to set aside the verdict, and enter a non-suit for the defendant, because the objections taken at the trial were not valid objections to the defendant's title.

Bell, Q. C., (of Belleville), shewed cause :—

As to the first objection, the evidence of the County Treasurer was, that the Collector's roll for the Township of Elzevir, in which the land lies, was not completed and sent to him before the 26th of August, 1852, while the warrant to sell was made and delivered to the Sheriff on the 11th of August, 1857, several days less than five years from the time the Collector's roll was complete.

By the 13 & 14 Vic. ch. 67, sec. 10, the assessments for a year are not to be held as due, for the purposes of a sale of land, until the 31st of December of that year, and perhaps not until the Collector's roll is returned, if after that day. Here the roll never was returned. Under sec. 33 the Collector must first demand payment before he can

enforce payment. By sec. 45 the Treasurer was required to make a list of lands on which taxes remained due at the time the Collector made his return. By sec. 41 the Collector's roll was returnable on the 14th of December. The taxes, so as to charge lands by way of sale, were not due till that time.

By the Act of 1853, sec. 55, the sale could only be made "whenever a portion of the tax on any land has been due for five years." The Treasurer is then to issue his warrant for that purpose.

The warrant issued before any portion of the taxes had been due for five years: the sale was therefore void: *Corbett v. Taylor*, 23 U. C. 454; *Ford v. Proudfoot*, 9 Grant, 479; *Kelly v. Macklem*, 14 Grant, 29.

As to the eighth objection, he cited *Riley v. The Niagara District Bank*, 26 U. C. 21; *McKee v. Woodruff*, 13 C. P. 583; 27 & 28 Vic. ch. 28, sec. 43; and as to the ninth objection, *Bruyere v. Knox*, 8 C. P. 520.

Wallbridge, Q. C., contra:—The taxes for 1852 must have been due before the end of that year, and before the return of the Collector's roll, because he could enforce payment of them before that time.

The taxes for a year are imposed for that year, beginning on the 1st of January, and ending on the 31st of December, being the taxes for that year: they are the taxes for the whole of it, and may be claimed as due for the whole year.

As to the eighth objection, the Statute speaks of the Sheriff making the deed; that is, the person who fills the office of Sheriff at the time when the deed is made. The individual himself filling that office has no title, personally, in the land to convey: the transfer is just as well, and better in most respects, made by the official for the time being who is Sheriff when the deed is executed, than if made by a person not Sheriff in fact, though he happened to be so when the sale was made. A person who is *not* Sheriff cannot make the deed at all: if made by any one, it must be made by the person who is Sheriff.

As to the ninth objection, he referred to *Burnham v. Daly*, 11 U. C. 211; 29 Vic. ch. 24, sec. 57; *Mitchell v. Greenwood*, 3 C. P. 465; *Doe d. Spafford v. Brown*, 3 O. S. 90.

As to the seventh objection, the three acres were not in fact separated from the west-half lot till October, 1854, so that the whole half lot was rightly assessed for 1852, 1853, and 1854, which are the only years for which the sale was made.

A. WILSON, J., delivered the judgment of the Court.

I do not consider the second, third, fourth, fifth, and sixth objections, nor, I may add, the seventh. The second and third objections are answered by the case of *Brooke v. Campbell* (12 Grant, 527). The fourth and fifth objections have been disposed of already in the case of *Cotter v. Sutherland*.*

The sixth objection is not good, because the west-half lot is a good and full description of itself; and the seventh objection has been removed altogether.

The objections to be considered are those upon which the case has been argued.

The case of *Corbett v. Taylor* (23 U. C. 454) shews that taxes imposed for a year are not to be considered as due from the first of that year; that they cannot be due before they are imposed.

The deed in that case was made on the 13th of April, 1863, and the by-law fixing the rate was passed on the 21st of July of that year. The question was whether the defendant's covenant, that no taxes were in arrear, was broken by the subsequent imposition of taxes in that same year. It was not necessary to determine that the taxes for that year became due by the mere imposition of them; or that the computation of time from which lands became liable to be sold for arrears of taxes is to be reckoned from the time the taxes are imposed.

* See preceding case.

In *Ford v. Proudfoot* (9 Grant, 479) Spragge, V. C., was of opinion no taxes could be due before they had been imposed by the Council, and that the time for selling for arrears must begin to count from that time at the soonest. He does not say that this is so: it was only necessary for him to determine that it could not be from a time so early in the year as the 25th of February. His opinion was further stated as follows: "It is clear from the sections to which I have referred, that no taxes for a year or part of a year are made payable until the Collector's roll is placed in the Collector's hands, because, until that is done, there is no hand to receive them."

In *Kelly v. Macklem* (14 Grant, 29) it was determined there must be the full period of arrear of taxes due, for which lands can be sold, before the warrant to sell issues.

The time in the present case is more circumscribed than in any of those referred to; for here, no doubt, the taxes had been imposed by the Council more than five years before the warrant to sell issued, though that fact was not proved affirmatively, for the parties rested on the fact of the Collector's roll not having been completed and delivered to the Collector until the 26th of August, 1852, from which it appeared the warrant to sell was issued within the five years, and therefore too soon, according to the Act of 1853, under which the sale was made.

The passage quoted from the judgment of the learned Vice Chancellor, in *Ford v. Proudfoot*, shews that, in his opinion, the five years should not begin to count before the delivery of the roll to the Collector, for until then there is no hand to receive them.

In *Corbett v. Taylor*, Draper, C. J., said: "We take arrears to mean something which is behind in payment, or which remains unpaid; as, for instance, arrears of rent, meaning rent not paid at the time agreed upon by the tenant: it implies a duty and a default."

The section of the Statute, which was in force and affected the sale, declared "that the taxes levied or assessed for any year shall in all cases be considered and

taken to have been imposed for the then current year, commencing with the first day of January, and ending with the thirty-first day of December, unless otherwise expressly provided for by the enactment or by-law under which the same are imposed, or authorized or directed to be levied."

This provision has been continued down to the present time: it was first enacted in 1850, ch. 67, sec. 10.

A person who pays the taxes imposed on him for a particular year before the end of that year, pays the amount in advance: he pays it up to a day which has not yet arrived: the time for its payment has gone by, but the time for its complete accrual has still to come.

In one sense the tax may be said to be due when it is imposed by the passage of a by-law for that purpose; but it cannot strictly be said to be due until the Collector has got his roll; nor even then, for he cannot distrain or take any compulsory proceeding to enforce payment until he has called at least once on the party taxed, and demanded payment, or transmitted a statement by post demanding payment, if the party be not resident within the municipality.

If payment be refused or neglected for fourteen days after such demand, the Collector may enforce payment. Until this proceeding has been adopted and the Collector is in a position to enforce payment, how can it be said the taxes are due?

Why cannot the Collector enforce payment before demand, or before the expiration of fourteen days from demand? The answer is, because the taxes are not due: they are not in arrear.

And as to the taxes against lands of non-residents [the land in question having been so assessed], the Collector by sec. 42 of the Act of 1853 could not proceed by distress against any goods found thereon till after one month from the date of the delivery of the roll to him: until the lapse of that month the taxes therefore should not be considered as due and in arrear.

By sec. 46 the Collector was to return his roll to the Treasurer of the township, unless the time were extended.

By sec. 47 the Collector was also to deliver to the Treasurer of the township an account of all taxes remaining due on the roll.

By sec. 49 the Treasurer of the township was, within fourteen days after the time for the return of the Collector's roll, to furnish to the Treasurer of the county a correct copy of the roll, so far as the same related to all lands in the municipality, distinguishing the rates with which they may be chargeable, &c.

By sec. 50, after the roll has been returned to the Township Treasurer, no more money shall be received by any officer of the municipality to which the roll relates; but the collection of such arrears shall belong to the Treasurer of the county alone. Now, if the roll were returned by the Collector to the Township Treasurer on the 14th of December, the person liable for non-resident land tax might pay the County Treasurer on the 15th of December, and if he did, he would be paying his taxes in advance for the remaining period of that year. If so, the same rule will hold till the end of that year, and then his taxes would not be in arrear till after the expiration of that year, for no demand would have been made on him to have made them due at an earlier day.

By sec. 51 the County Treasurer is then to enter the taxes unpaid on lands in a book, and on the first of May in each year is to balance his books, by entering against each parcel of land the arrears due at the last settlement "and the taxes of the preceding year which may remain unpaid; and he shall ascertain and enter therein the total amount of arrears, if any, chargeable on the land at that date."

The first intimation the County Treasurer has that there are any arrears of taxes due on land in any township within his county is by the copy of the Collector's roll sent to him by the Township Treasurer.

He is alone to receive payment of such arrears, and he

is to enter in a book, on the first of May after getting the roll, the lands on which the taxes of the *preceding year* are unpaid; and then by sec. 55, whenever a portion of the tax on any land has been due for five years, he is to issue his warrant to levy on the lands therefor.

I incline to think very strongly that the taxes of the preceding year, for the purposes of sale for arrears, are not to be considered as in arrear till after the expiry of the year in which they were imposed.

It is only after that time the County Treasurer has anything to do with them: the fiscal year is clearly correspondent with the calendar year in this respect, and the *preceding year's* taxes are those unpaid at the end of the year.

By fixing this definite period the computation of time is made easy for all parties, and there is nothing inconsistent in holding that taxes may be due, to enable a distress or suit to be maintained for them at one period, and that they may be considered as due at another period for the purposes of a sale of the land itself.

The Treasurer's books will certainly not shew five years' arrears, if any warrant for sale be issued by him, unless the time be computed from the first of the year after the preceding year's taxes have been imposed.

It is not absolutely necessary to go so far as this: it is sufficient for this case that at the time the Collector got his roll, on the 26th of August, 1852, the taxes for that year against the non-resident land were not due, and if not due then, no portion of the tax on this land was due for five years on the 11th of August, 1857, when the County Treasurer issued his warrant to sell the land.

The plaintiff is entitled to succeed on the first objection.

As to the eighth objection, the deed made to the defendant by Sheriff Taylor, who succeeded the Sheriff who made the sale, may be good under the 27 & 28 Vic. ch. 28, sec. 43: the Statute seems expressly to authorize it.

And as to the ninth objection, it will be better not to express an opinion upon it: the 29 Vic. ch. 24, sec. 57,

seems to give a sanction to the due registration of the deed; but as the case is disposed of on the first ground, there is no object in discussing the last ground. See also Statutes of Ontario, ch. 20, secs. 58-59. The rule will be discharged.

Rule discharged.

DOVE V. DOVE.

Landlord and tenant—Assignment of lease not under seal—Taxes—Distress—Beasts of the plough—Acquiescence of tenant.

The defendant, owner in fee, conveyed to E. D. and took back mortgage. E. D. then leased to plaintiff, and afterwards, by writing, without deed, assigned lease to defendant. A dispute having arisen whether tenant or landlord should pay taxes, the lease being silent as to this, defendant distrained, and plaintiff replevied. The Judge left it to the jury to say whether the plaintiff had attorned to defendant, and they found in the negative. On motion for a new trial, *Held*, that there could be no assignment without deed, and as the question of tenancy was raised by the pleadings, plaintiff must succeed, for he was not tenant by assignment, nor, as the jury had found, by attornment.

Held, also, that the landlord should pay the taxes, as the lease contained no provision as to them; and that as to the issue raised respecting beasts of the plough distrained, the tenant had acquiesced.

REPLEVIN, for distress for rent.

Avowry, that plaintiff was tenant to defendant of land, under a demise at a yearly rent of £50, payable on 1st March in each year, and because £50 rent was due defendant distrained.

Pleas, 1. Denial of tenancy.

2. No rent in arrear.

3. As to \$170, parcel, tender before distress, and refusal; and as to residue, nothing due.

4. As to two bay horses, one black mare, and two gelding bay colts, parcel, &c., the same were beasts of the plough, although there were other goods, not being beasts of the plough or instruments of husbandry, sufficient for the rent.

Issue.

Replication, also, as to fourth plea, leave and license of plaintiff.

The cause was tried at the County of York Assizes, before A. Wilson, J., in the Fall of 1867.

The facts were as follow :

Matthew Dove, defendant, father of plaintiff, was seised in fee, and on the 22nd June, 1863, conveyed by deed the land in question, in fee, to another son, Elijah Dove.

Elijah, on the same day, re-conveyed to Matthew in fee, with a condition or defeasance that Elijah should pay to Matthew £50 on 1st of April in each year during Matthew's life, without any deduction for rates, taxes, &c.

This was to be for the support of Matthew for life.

Elijah, on 8th August, 1863, by deed, let the land to William, the plaintiff, for three or four years, at the option of the lessee, from 1st of April, 1864, at the yearly rent of £50, payable on the 1st of March in each year, saying nothing about taxes.

Elijah, on the 12th February, 1866, by writing, signed by him, not under seal, endorsed on a blank leaf of the lease, "set over and assigned and released unto Matthew Dove, his heirs, executors, administrators and assigns, all the rent to become due me, by virtue of this lease, from William Dove, the lessee."

William paid Matthew the \$200 in or about March, 1866, for the rent which fell due on 1st of March that year, and it was so paid by reason of the transfer of the rent from Elijah to Matthew. William did not pay the rent which fell due in March, 1867. William was in possession of the land in 1863, when the lease was made : he paid the rents for 1864 and 1865 to Elijah : the receipt for rent, which was given for 1866, was signed by both Elijah and Matthew.

William wanted Elijah to sign a receipt on 2nd March, 1867, for the rent then just due, saying to Elijah that he, William, would not pay the rent to Matthew ; but Elijah said William did not offer him any money.

This was the case for the defence.

Counsel for plaintiff contended that no demise as alleged had been proved; no assignment of the lease or of the land was made, but of the rent at most; but that the rent was not assigned in law, as the instrument was not by deed; the defendant had no right of distress.

The defendant's counsel argued that the defendant was owner in fee of the land; that Elijah, having let to the plaintiff, after having mortgaged to his father, and the plaintiff being in possession at the time of the execution of the instrument of the 12th of February, 1866, there was, by reason of the plaintiff's payment of rent to defendant, then the owner in fee of the land, evidence of an attornment by the plaintiff to defendant, or of a new tenancy between the plaintiff and defendant; that the document just mentioned was a valid assignment.

The Judge charged that, as the plaintiff and defendant were both present when the rent in March, 1866, was paid, and the plaintiff paid it to the defendant, and as one McNally who was also present, acting for the defendant, said to plaintiff, "You are become your father's tenant in place of your brother," there was some evidence that the plaintiff and defendant had, independently of Elijah, formed the connection of landlord and tenant.

Upon this the plaintiff's case proceeded.

It was then proved that in March, 1867, plaintiff asked Elijah to sign a receipt for the rent, and he would pay it to him, but Elijah refused to sign it; that plaintiff went then to defendant and offered the rent to him, but defendant told plaintiff to keep it, that he, defendant, would see Elijah about it, and call, or get Elijah to call, on plaintiff for it in a few days; that plaintiff wanted the receipt for the rent of 1867 to be signed by both Elijah and defendant.

The money plaintiff offered to defendant was \$170.90. He claimed the right to deduct the taxes; defendant disputed his right to do so. Plaintiff paid the taxes for 1864-5-6. The taxes plaintiff claimed the right to deduct were \$29.10: defendant would not allow the deduction:

plaintiff had plenty of goods on the farm, beside his horses, to distrain on.

For defendant it was then proved that plaintiff shewed the horses to the bailiff along with his other property, and said, "All these are mine; take any of them."

The taxes claimed by plaintiff he had the right to deduct from the rent of 1867, were, for 1864, \$7.80, for 1865, \$7.80, and for 1866, \$13.50, equal to \$29.10.

The Judge left to the jury the question whether that which took place in March, 1866, created a tenancy between plaintiff and defendant, or whether plaintiff only acknowledged defendant as his landlord under the writing made by Elijah to defendant about the rent. The jury were told, also, the plaintiff had not the right to deduct more than the last year's taxes.

The plaintiff's counsel objected to the question respecting any supposed tenancy having been created in March, 1866, being left to the jury, and that plaintiff had the right to deduct the whole three years' taxes.

The defendant's counsel objected to the charge as to the last year's taxes, because the plaintiff had paid the amount voluntarily, and as to the direction that the writing did not pass the rent in law.

Leave was reserved to both parties to move.

The jury found a verdict for the plaintiff, and 20s. damages.

In Michaelmas Term last, *R. A. Harrison*, Q.C., obtained a rule to set aside the verdict and enter it for the defendant, on the ground that the defendant was entitled to the rent in question, and had power to distrain for the same; or for a new trial on the law and evidence, and the weight of evidence.

McMichael now shewed cause:—

The defendant was in effect a mortgagee before the lease was made by the mortgagor to plaintiff, and as such prior mortgagee he had no right to distrain: *Woodfall's L. & T.* 9th ed. 194–387; *Doe d. Bowman v. Lewis*, 13 M. & W.

241; *Keech v. Hall*, 1 Dougl. 21; 1 *Smith's L. C.* 4th ed. 440; *Walmsley v. Milne*, 7 C. B. N. S. 133; *Delaney v. Fox*, 2 C. B. N. S. 768; *Gladman v. Patmer*, 10 Jur. 109; *Whitmore v. Walker*, 2 C. & K. 615; *Hickman v. Hickman*, 4 H. & N. 716.

Harrison, Q. C., contra :—

The defendant, as assignee of the rent, can sue for it in his own name: *Robins v. Cox*, 1 Lev. 22; *Marle v. Flake*, 3 Salk. 118; *Allen v. Bryan*, 5 B. & C. 512; *Brady* on Distress.

Rent is a mere chose in action, and writing without a deed is sufficient to pass it.

C. S. U. C. ch. 90, sec. 4, does not apply to rent. He referred also to *Hogan v. Berry*, 24 U. C. 346; *Brown v. Storey*, 1 M. & G. 117.

A. WILSON, J., delivered the judgment of the Court.

It was argued that rent was a chose in action; that it was assignable in law without deed; and that ch. 90, sec. 4, and the two cases last cited, were authorities for that proposition.

That section provides, "That a partition and an exchange of land, and a lease required by law to be in writing of any land, and an assignment of a chattel interest in any land, and a surrender in writing of any land, not being an interest which might by law have been created without writing, shall be void at law unless made by deed."

This Statute, so far as it has application, is directly against the defendant, and the case in 24 U. C. 346, merely decides that a sale of a growing crop of wheat was a chattel independent of the land, and saleable without a deed, having no application to any question arising in this case. But, so far as it may be supposed to have an application, it is also against the defendant; while *Brown v. Storey* decides that, when a mortgagee serves a notice on the lessee of the mortgagor, who has become such since the mortgage, to pay rent to the mortgagee, and the tenant acquiesces, that it is some evidence of the tenant becoming a lessee direct from the mortgagee.

This last case applies to the question which I submitted to the jury, but which they found against the defendant.

Rent is a tenement, for it may be holden ; and, to define the specific nature of the tenement, it is called an incorporeal hereditament : 2 Bl. Com. 16.

One may have an *estate* in rent : *Cruise's* Dig. tit. 28, ch. 2.

It lies in *grant*, because it is incorporeal : 2 Com. 317.

The assignee of the rent may sue for it in his own name, as the cases cited on this part of the argument shew, and as many cases, which might be added to them, also shew.

There may be a seisin had of a freehold rent, and possession of a chattel interest in rent : *Litt.* sec. 233, and commentary on same section ; *Crabbe's* Law of Real Property, sections 186-7. This seisin or possession is had by payment of it : *Cruise's* Dig. tit 28, ch. 1, sec 15.

Seisin, possession, or attornment, is in no case necessary now to perfect a grant, and therefore the mere legal instrument passes the right and estate of the assignor of the rent without the act or assent of the tenant to it.

Rent, then, being an estate which may be holden or possessed, and which is transferable by grant from one person to another, and which may be sued for in the assignee's name, is clearly distinguishable from a chose in action, which is so called because there is no possession of it, but a right to recover possession by a suit or action at law : 2 Com. 397-8; and which is not at law grantable over ; 2 Com. 442; and when sued for can only be prosecuted in the name of the assignor.

There is not the slightest pretence for calling rent a chose in action.

The next question is, can a rent be transferred by lessor to a stranger without deed ? It has always been reputed that it could not, but it has been argued here that it could.

Shep. Touch. 228, states that rents and the like which do not lie in livery, but pass by delivery of the deed, cannot pass from one man to another without deed.

The plaintiff must succeed in this case; firstly, because the defendant did not demise the land to the plaintiff as alleged; and secondly, because the rent was never legally granted to the defendant, so that he had not the right to distrain for it as an assignee might have done.

The defendant fails, because he was attempting to make the plaintiff, who held as lessee of Elijah, pay the taxes on the land, while he was not bound by his lease to pay them: C. S. U. C. ch. 55, sec. 26; and because he did not look to Elijah for his \$200 free from all deductions for taxes, who was bound by his covenant to pay the annuity free therefrom.

The defendant was only enforcing his due, but unfortunately he was enforcing it from the wrong person, and by the very sharp process of a distress. It was the taxes alone that were in dispute, for the plaintiff offered to pay his rent, less the taxes. Whether he was authorized in retaining the three years' taxes or only the last year's amount is of no moment, for the defendant had no right to distrain at all.

Rule discharged.

HOPE V. WHITE ET AL.

Rent-seck—Right of grantee to distrain in his own name—General issue by Statute—4 Geo. II. ch. 28.

Defendant White, a lessee, sub-let to plaintiff, and subsequently, by deed, granted two quarters rent to defendant McLean, who distrained in White's name, and plaintiff brought an action, contending, 1st, that there could be no distress, and 2nd, that he had paid White without notice of assignment:

Held, that the grantee by deed of a rent-seck out of a term of years can, by virtue of 4 Geo. II. ch. 28, distrain for the same out of the land which was charged with its payment before it was granted; that McLean, the grantee in this instance, could have distrained in his own name, and that the defence could be set up under the general issue by Statute; and that as McLean authorized the distress, and it was for his benefit, it was a sufficient answer, although the distress was in the name of White.

The facts of this case are fully reported in 17 C. P. 52.

The case now came before the Court on a rule to enter a nonsuit, when the same Counsel appeared as on the former occasion.

The arguments and authorities cited appear from the judgment of the Court, which was delivered by

A. WILSON, J.

When this case was before us on a former occasion we felt obliged to grant a new trial, because we thought the verdict was contrary to the evidence, the jury having found that Hope, the tenant, had not received notice of the grant of the rent having been made by White, the lessor, to McLean, the grantee, until after Hope had paid the rent to White.

We were not then strictly called upon to determine the legal questions which were referred to in disposing of the case. My brother Wilson and myself both stated that, in our opinion, a rent-seck, reserved on an estate for years, could, since the 4 Geo. II. ch. 28, be distrained for in like manner as rents which were incident to the reversion.

This point has been argued by Mr. Harrison on the present rule. He contends that the Statute of Geo. II. does not apply to rents-seck which are reserved on estates for years, but to rents of a freehold nature only, and he referred to the following authorities as supporting his view: *Burton's Real Property*, 4th ed. 367, 8th ed. 345; 2 *Arch. L. & T.* 2nd ed. 289; *Coke on Litt.* secs. 228, 233, 235; *Prescott v. Boucher*, 3 B. & Ad. 849; *Parmenter v. Webber*, 8 Taunt. 593; *Grant v. Ellis*, 9 M. & W. 113; *Johnston v. Falkner*, 2 Q. B. 925; *Viger v. Dean, &c.*, 18 L. J. Q. B. 84-97; *People v. Haskins*, 7 Wend. 463.

The Statute of Geo. II. makes no such distinction between rents-seck. The 5th section is: "Whereas the remedy for recovering rents-seck, rents of assize, and chief rents, are tedious and difficult, be it therefore enacted, that from and after, &c., all persons shall and may have the like remedy by distress, &c., in cases of rents-seck, rents of

assize, and chief rents, which have been duly answered or paid for the space of three years within the space of twenty years before the first day of the present Parliament, or shall be hereafter enacted, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding."

In *Coke* on Littleton, 162 *b.* note, 6, the annotator says, "Why these two latter [rents of assize and chief rents] were added in this Statute, I do not understand."

A rent-seck of *freehold*, or arising from a *freehold* interest, might formerly have been recovered by an assize: *Gillb.* on Rents, 88; *Com. Dig.* "Rent," D. 1; or by an annuity: *Gillb.* on Rents, 118, 119, 123, 124; 6 *Coke*, 58; *Coke* on Litt. 146 *a.* sec. 220; or by debt, when the freehold was determined, but not during its continuance: *Gillb.* on Rents, 123; 6 *Coke*, 58.

A rent-seck for years, or created out of a *chattel* interest, could not be recovered by an assize, as that was a remedy confined to freehold rights: *Com. Dig.* "Assize," B. 5; but from what I see it appears to be clear that annuity lay for it: *Fitzh. N. B.* 152, A.; *Com. Dig.* "Annuity," A. 1, 2; and certainly an action of debt lay for it, as appears by many of the following cases.

There are several instances of what are called rents-seck being distrainable for; that is, rents where there is no reversion; as, when a rent is granted by one parcener to another for equality of partition; or is granted to a woman in lieu of her dower; or is granted in lieu of lands as on exchange: *Coke* on Litt. 169 *b.*; *Gillb.* on Rents, 19, 20.

So, if there be lord, *mesne* and tenant, and the tenant holdeth of the *mesne* by the service of 5s., and the *mesne* holdeth of the lord by the service of 1s.; if the lord purchase the tenancy in fee, the service of the *mesne* is extinct: *Litt.* sec. 231; but, as is said in sec. 232, inasmuch as the *mesne* has more in advantage by 4s. than he pays, he shall have the 4s. as a rent-seck yearly of the lord who purchased the tenancy; and the commentary is, "and yet he shall distrain for it." So it is said the conusee of a Statute, who has the rent extended and delivered to him,

may distrain for it, because he comes to it by law : *Coke* on Litt. 153 *a* : see also note (1) ; 2 *Vent.* 328 ; *Vin. Abr.* "Distress," D. 2, pl. 4-8 ; *Coke* on Litt. 147 *b*.

The term *seck* is used in different senses ; sometimes to express the want of remedy by distress, and sometimes the want of present fruit and profit, as in the case of a reversion without rent or other service except fealty : *Coke* Litt. 151 *b*, note (5).

It is clear that a person may have an *estate* in rent, as in fee, for life or for years, by courtesy or in dower ; and may be seised or possessed of it ; the old writers are all agreed about this : (see also the late case of *Heeles*, appellant, v. *Blane*, respondent, 18 C. B. N. S. 90) ; and that it is grantable over ; and there is no difference in these respects between rents-service, rents-charge, and rents-seck.

The rule which existed at common law, that a distress might be made for rents-service, but not for other rents, was the occasion of the passing the 4 Geo. II. ; as the rule which prevailed at the common law, that debt could not be maintained for a freehold rent during the continuance of the freehold estate, was the occasion of the passing of the 8 Anne, ch. 14.

I shall first refer to those authorities which shew that debt for rent-seck may be sued for by the assignee of the rent in his own name.

In *Goodman v. Parker* (T. Jones, 1) a lessor for years, who had a rent reserved, granted the rent : the lessee attorned : the grantee in his own name brought debt against the lessee : *Held*, the attornment created privity, and that the action was well brought.

This was before the Statute of Anne, which dispensed with the necessity of attornment.

Ards v. Watkin (Cro. Eliz. 637-651), referred to in the preceding case, shows the same right passed to the devisee of a lessee for years, to whom the rent reserved on a sublease was devised.

Newcomb v. Harvey (Carth. 161) was where a lessee for years conveyed his whole term to the defendant, reserving

rent : *Held*, he could sue assignee in debt for rent. The Court said : " This is a rent, although the plaintiff had no reversion ; for if a rent is reserved upon a feoffment in fee, there is no reversion in the feoffor ; but yet this is a rent, and recoverable by the name of a rent upon the contract, and so it shall be in the principal case. Moreover, if the defendant had assigned over the term to another, an action of debt would lie for the plaintiff against the second assignee ;" and it is also added in a note : " A termor surrendered to the lessor without deed rendering rent, and it was adjudged that this was reservable as rent, and that it was not a sum in gross," referring to *Wilston v. Pilkney* (1 Vent. 242-272) ; 2 Lev. 80. *Midgleys v. Lovelace* (12 Mod. 45) ; Holt, 74 ; *Brownlow v. Hewley* (1 Ld. Ray. 82) ; *Clarke v. Coughlan* (3 Ir. L. Rep. 427) ; *Williams v. Hayward* (1 El. & El. 1040) ; and *Baker v. Gostling* (1 B. N. C. 19), are all to the same point.

Nothing, therefore, can be better settled than that the grantee of a rent-seck originally created, or the assignee of a rent made seck by being severed from the reversion, can maintain an action of debt for the rent in his own name, as well in the one case as in the other, against the grantor who created it, or against any lessee or sub-lessee of the assignor, or any of their assigns, in like manner as for a rent service. But, as McLean, the grantee of the rent in dispute, has not brought an action of debt, but has distrained for the rent, the question is, whether he had the right to distrain for it in his own name, or in that of White, the grantor.

The *Statute* of Geo. II. makes no difference between one kind of rent-seck and another, or whether in freehold or for years.

In *Dodds*, appellant. v. *Thompson*, respondent (12 Jur. N. S. 625 ; L. R. 1 C. P. 133), referred to in the former decision between the parties to this suit, it was determined that a rent charge of *freehold*, but for which no remedy was given to the grantee to enforce payment of it, and which, before the *Statute* of Geo. II. was merely a rent-seck, was since that *Statute* remediable by distress.

There can be no question then but that a rent-seck of freehold may be distrained for: the question is, whether a rent-seck issuing out of a chattel interest of land, or out of a term of years, can be distrained for.

The rent in this case is rent which has become seck by being severed from the reversion: it is rent which was before the grant of it payable as rent-service; but it does not appear to be distinguishable from rent granted by a lessee for years out of his chattel interest.

Sir W. Blackstone, in 3 Com. 6, says: "Distresses were incident by the common law to every rent-service, and, by particular reservations, to rent-charges also; but not to rent-seck, till the Statute 4 Geo. II. ch. 28 extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them; so that now we may lay it down, as a universal principle, that a distress may be taken for any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it."

The later authorities are not entirely to this effect.

In Smith's L. & T. 2nd ed. 189, it is said: "Another general rule is, that a landlord, who has no reversion, cannot distrain: therefore, if a lessee for years assigns his term, reserving a rent, he cannot distrain at common law, nor under the 4 Geo. II. ch. 28, sec. 5; but he may bring debt for the rent, which is not merely a sum in gross, although no reversion remain in him;" and for this the following authorities are cited: *Newcombe v. Harvey* (Carth. 161); ——— v. *Cooper* (2 Wils. 365); *Smith v. Mapleback* (1 T. R. 441); *Preece v. Corrie* (5 Bing. 24); *Pollock v. Stacy* (9 Q. B. 1033); *William v. Hayward* (1 El & El. 1040); and it is said that a tenant from year to year, who underlets from year to year, has a sufficient reversion to entitle him to distrain: *Curtis v. Wheeler* (M. & M. 493).

Now, *Newcombe v. Harvey* (Carth. 161) merely decides that a lessee for years, who assigns his whole term to the defendant, rendering rent, can maintain an action of debt

for it against the assignee. It decided nothing about the effect of the 4 Geo. II. ch. 28, for the case was decided long before that Statute was passed, and as the law then stood, the lessee, so assigning his whole term, could certainly not distrain.

The case of ——— v. *Cooper* (2 Wils. 375), was exactly like the case in *Carthew*: an assignment by the defendant, who was lessee for years, to the plaintiff, in which there was no clause of distress. It was argued that the 4 Geo. II. applied, but the Reporter says, "This case was so clear that the Court gave judgment for the plaintiff without hearing his counsel." The Court said: "There are two ways of creating a rent: the owner of the land either grants a rent out of it, or grants the land and reserves a rent: there is no such thing as a rent-seck, rent-service, or rent-charge, issuing out of a term for years. Bro. Dette, fol. 39, cites 43 Ed. 3. 4. per Fynchden, Chief Justice, C B.: "If a man hath a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain if the rent be in arrear. This case is law and in point; therefore, if the avowant will recover what is owing to him from the plaintiff, he must bring his action on the contract. Judgment for the plaintiff, *per totam curiam*."

There can be no doubt that in the time of Edward III. there could have been no distress for rent reserved to the lessee for years, who granted all his estate, for there was no such remedy until the Statute of Geo. II., and therefore the case in *Brooke* was no authority that the assignor could not distrain under this late Statute.

Then, it is said, "There is no such thing as a rent-seck, rent-service or rent-charge, issuing out of a term for years;" but in *Coke* on Litt. 147 *b.* it is said: "If a man, seised of lands in fee, and possessed of a term for many years, grant a rent out of both for life, in tail or in fee, with clause of distress out of both, the rent, being a freehold, doth issue only out of the freehold, and the lands in lease are only charged with a distress; but if he had granted the rent

only out of the lands in lease, for term of life of the grantee. *this had issued out of the term*, and the land had been charged during the term, if the grantee lived so long." And *Plowd.* 524-5, is referred to, where it is stated, "And Manwood said, in his argument, that if tenant for years of land grants a rent-charge out of it to another for the life of the grantee, the grantee shall not have an estate of freehold in the rent, because he cannot have a freehold derived out of a chattel real; but he said he should have the rent during all the years; as, if the lessee has forty years in the land, the grantee shall have forty years in the rent, &c.:" Butts' Case (7 Coke, 23); *Kelly v. Clubbe* (3 B. & B. 130).

In *Burton's Real Property*, — ed. fol. 345, it is said, "A rent may be granted with an express power of distress out of an estate for years." What follows may be questioned, but it is not important here to consider it.

In *Mounson v. Bradshaw* (1 Saund. 187) a lessee for years granted a rent charge with a clause of distress, under which a distress was made, and it was held to be maintainable.

In *Burton on Real Property*, — ed. fol. 332, it is said; "By the Statute the distinction in respect of remedy is abolished as to all rents; * * * and the extent of the remedy, with the mode of enforcing it, is made uniform for all such rents-seck and rents-service;" and in fol. 345 he says: "A rent may be granted with an express power of distress out of an estate for years, but, in whatever way limited, it can only be a chattel interest; and for this reason it seems that without the clause of distress such a rent would be void, for before the Statute of 4 Geo. II. ch. 28, there was no remedy for non-payment of a rent-seck, as such, except by assize, which was confined to freehold interests, and the law would not recognize a right for which it gave no remedy."

This appears to be not quite correct, for the grantee of a rent-seck from a termor for years, before the Statute, had both the remedy by account and by debt, from the authorities herein quoted; but whether he *had* a remedy

or not is of no consequence, if he have now one under the Statute.

These authorities I consider to be quite sufficient to answer the *dictum* in *Wilson's Reports*, that "a rent cannot issue out of a term for years."

Then, again, the case of *Goodman v. Parker* shews the lessor for years granted the rent out of his term for years. *Newcombe v. Harvey* shows the lessee for years reserved rent upon and out of his estate for years; and the Court there said the reservation was *a rent*, and was recoverable by the name of a rent; and so *Brownlow v. Hewley*, *Wilston v. Pilkney*, *Clarke v. Coughlan*, *Baker v. Gostling*, and *Williams v. Hayward*, are all against the dictum that "there is no such thing as a rent-seck, rent-service, or rent-charge, issuing out of a term for years." This dictum, if it is to be understood as it is given, would exclude rent from ever being reserved on an under-lease, and this could scarcely have been meant, but it appears to be not warranted, as a proposition of law, from the authorities mentioned.

There is a very good note to the case of *Floyd v. Langfield* (Freem. 218, case 226, 2nd ed. 1826, by Mr. Smirke), in which it is stated that in *Smith v. Mapleback* (1 T. R. 441) and *Parmenter v. Webber* (8 Taunt. 593), and probably in the case in *Wilson* also, "The party distraining avowed shortly as for rent-service under the 11 Geo. II. ch. 19, and was therefore precluded from insisting that the reservation took effect as a rent-seck or rent-charge, and that the conveyance in ——— v. *Cooper* (2 Wils.) does not appear to have been by deed indented, and in the two other cases it appears to have been without deed."

The force of this statement, as to the mode of avowing, will more fully appear from the observations of Tindal, C. J., in *Pascoe v. Pascoe* (3 B. N. C. 898), afterwards mentioned.

Then, to follow up the cases above referred to in *Smith's L. & T.* 189, *Smith v. Mapleback* (1 T. R. 441) states that the plaintiff was possessed of the premises for a long term of years, and by indenture demised to Robert Swin for

eight years, who by indenture assigned to William Swin, who by indenture assigned to W. M. Sellon. The plaintiff applied to Sellon for the premises, and an agreement was entered into between Sellon and the plaintiff's wife, as agent for her husband, that "Mr. Smith (the plaintiff) was to have the house on the terms as mentioned in the lease, and to pay £8 10s. over and above the rent annually towards the good will already paid by Mr. Sellon." The defendant, as bailiff of Sellon, distrained on Smith. Shepherd, for the defendant, among other grounds, contended that the 4 Geo. II. ch. 28, when there was a reservation of rent by contract, gave a remedy by way of distress for it. The Court thought there had been a surrender by Sellon to the plaintiff, and that the £8 10s. annually was not reserved as rent, but as a sum in gross for the good will.

This case, therefore, is not a decision that a rent-seck cannot issue out of a term for years, nor that a distress cannot be made under the Statute for such a rent.

Preece v. Corrie (5 Bing. 24) determined that lessee for years, who conveyed all his interest for a certain sum, payable immediately, could not distrain for the same, because he had parted with all his estate and had no reversion. This is a decision in favour of the view expressed in 2 Wils. 375, but no reference is made to the Statute of George II. : perhaps, too, it was not *rent* at all.

In *Pollock v. Stacey* (9 Q. B. 1033), which was for use and occupation, Lord Denman, C. J., said : "Where the lessee of a term had demised it over for his whole term, he cannot distrain, not having any reversion : this is not disputed ; but the negative of the right to distrain does not at all imply a negative to sue for use and occupation ;" and he quoted *Preece v. Corrie* (5 Bing. 24), *Parmenter v. Webber* (8 Taunt 593), and one or two other cases.

Williams v. Hayward (1 El. & El. 1040) was not the case of a distress, but an action on an indenture for rent. The facts were that the lessee of certain mines for 30 years demised the same to defendant for a longer term, reserving rent. The lessee then assigned the rent to the plaintiff,

who sued the sub-lessee for rent accruing due by the defendant since the assignment to the plaintiff, and it was held he could sue the defendant for such rent, that it was rent seck and not a sum in gross, and was assignable.

This case does not decide anything with respect to distraining for a rent-seck accruing from a chattel interest.

The only decisions so far against the right to distrain are — *v. Cooper* (2 Wils. 375) and *Preece v. Corrie* (5 Bing. 24), which last case is approved of, as before mentioned, in *Pollock v. Stacey* (9 Q. B. 1033), and *Parmenter v. Webber* (8 Taunt 593). Now, these are all the cases cited in *Smith's* Landlord and Tenant for the doctrine which is there laid down. The case in 2 Wils. is founded on the passage quoted from the Year-book, which is perfectly true and undisputed; but it cannot govern a case arising under a Statute passed 400 years afterwards, and it is founded also on what appears from the authorities before mentioned to have been an erroneous assumption of law, "that a rent cannot issue out of a term for years." If this case be wrong, *Parmenter v. Webber* must be wrong also, for it follows it literally. *Preece v. Corrie* does not refer to the case in Wilson, nor does it refer to the 4 Geo. II. ch. 28; but it does lay down the law to be that the want of a reversion prevents the exercise of the right to distrain; and *Pollock v. Stacey* cites the last case with approval, and affirms that to be the rule of law.

The two decisions last referred to were, that conveyances by the tenant of his whole interest were not to be construed as assignments, but as leases only.

If they had been held to be assignments, the sum reserved as rent could not have been considered a rent; for as there was no reversion to which it could be made incident, it could only be created by way of grant to the assignee, and this would have required *a deed*, for being an incorporeal hereditament the rent lay in grant only.

The want of a deed in those cases where the conveyance was by assignment, is a sufficient reason for the decisions given; and this disposes of all of them but *Preece v.*

Corrie, and there, although the whole interest of the lessee was transferred, the Court held it to be a lease and not an assignment, by which the assignor was enabled to sue for his *rent reserved*, though he could not distrain for it.

It is impossible to deny that the opinions of many very able Judges have been against the right of distress, as claimed and exercised in this suit; to which *Poultney v. Holmes* (1 Str. 405) may be added, and the argument of Sergt. Stephen in *Baker v. Gostling* (1 B. N. C. 19).

The authorities in favour of the power to distrain are the Statute itself, which makes no difference between one class of rents-seck and another; and the only reason for making a distinction is, that before the Statute debt would not lie for a *freehold* rent of any kind, while the freehold lasted, as the law would not suffer a real right to be remedied by a proceeding wholly personal: 3 Bl. Com. 232; Com. Dig. "Debt;" A. 7 *Webb v Jiggs* (4 M. & S. 113); while for rent from a chattel interest debt lay at the common law. There was, therefore, less reason for relief in the case of chattel than of freehold interests; but the Statute, notwithstanding this, has made no difference between them.

Then, secondly, in 3 Com. fo. 6, the Statute has made it "a universal principle that a distress may be taken for any kind of rent in arrear."

In *Smith v. Mapleback*, when Shepperd contended that a rent-seck out of a chattel interest could be distrained for under the Statute, the Court did not oppose his argument.

Thirdly, the case of *Pascoe v. Pascoe* (3 B. N. C. 878). There the plaintiff, to an avowry for rent, pleaded that the demise in the avowry was of all the avowant's term and interest in the premises. The replication was held to be a departure and bad.

In giving judgment the Chief Justice said that the defendant in his avowry had relied "on the common law right to distrain as for rent-service. * * * We think the plea alleges with sufficient certainty that at the making of the demise *Pascoe*, the younger, did not reserve any reversion

in himself, and consequently without an express provision for that purpose has no remedy by distress. The authorities to this point are collected in *Bac. Abr.* "Distress" A. * * * For although it is true that the rent may be a rent-seck, and that the remedy is the same under the Statute for a rent-seck as for a rent-service, yet the avowry is for a rent-service at common law and not for a rent-seck."

The same view is referred to also in the note to *Freeman* 218, before mentioned. See also *Bulpit v. Clarke* (1 N. R. 56); *Musgrave v. Emerson* (10 Q. B. 326); 1 *Wm. Saund.* 168, note.

It will be noticed that Chief Justice Tindal makes no distinction between freehold and leasehold rents; and he thinks when a rent-seck is distrained for the *avowry* should be framed in respect of the right conferred by Statute to distrain, and should not be justified as under the common law, or under the 11 Geo. II. ch. 19, which is applicable only to rents service.

In *Saffery v. Elgood* (1 A. & E. 191) a tenant for years granted a rent-charge for life: his grant was held good as a chattel interest, and it was held the goods of a stranger on the premises, not holding by a paramount title, might be distrained for the rent-charge. *Butt's case* (7 Co. 23a) was cited in support of the validity of the rent charge: nothing said against its being void because grantable out of a term for years.

Fourthly, it is clear that a rent-charge may be granted out of a term for years, and that a distress may be granted in such a case: *Butt's case* (7 Co. 23a); 1 *Saund.* 187; *Plowd.* 524, 5; *Burton on Real Property* 345; *Co. on Litt.* 147b; *Saffery v. Elgood* (1 A. & E. 191); *Vin. Abr.* Estate H. pl. 5.

Now this seems conclusive, that a rent-seck may be so granted as well, for without the clause of distress the rent will be seck; and as the effect of the 4 Geo. II. ch. 28 is to give a *general* power of distress when the special clause of distress is *not* contained in the deed, and rents-charge are

not within the Statute, as the distress for them is regulated by the terms of the deed which confers it, why may not the grantee of a rent, who might distrain by deed, have the power to distrain by Statute, when the deed does not grant the right? In the case of a freehold rent the right is not doubted: what is there to distinguish the cases?

A rent-seck perhaps cannot be reserved without a deed, there being no reversion to support it: no doubt it cannot be created or granted *ab origine* but by deed.

In this case White, the lessor, did grant the rent to McLean by deed, and without doubt McLean could sue for it in his own name. According to some authority he cannot distrain for it: according to the Statute and to much authority he can distrain for it.

Keeping in mind the fact that in some cases where the lessee has *assigned* his interest, he has done so not by deed reserving rent, and having no reversion he could not distrain, and having no *deed* in respect of the rent he had no *grant* of it, and so strictly he had no *rent*, and could not distrain for it; and keeping in mind that a rent-seck requires to be specially by Statute avowed for,—much difficulty may be avoided in understanding and reconciling the cases.

I think McLean had the right to distrain in this case; but I feel the difficulty of forming or expressing a clear opinion in the face of some of the authorities which have been mentioned. I cannot, however, help entertaining this opinion, however erroneous it may be. I cannot force my understanding to accept a conclusion which I do not think to be correct. I may be controlled by authority, when I may not be convinced, but when not so bound I must express my own actual conviction: it is singular there should be any doubt in such a case.

It was argued that the decision in *Grant v. Ellis* (9 M. & W. 113) and the observations of Mr. Burton upon it shewed that the Statute of George II. only applied to freehold rents; but this is quite a mistake, for the case just mentioned was whether the Imperial Act 3 & 4 Wm. IV.

ch. 27, sec. 2, applied to rents *reserved* on leases, or whether it was not confined to those ancient rents "existing as an inheritance distinct from the land, and for which before the Statute the party entitled might have had an assize, such as ancient rent service, fee farm rents, or the like:" per *Rolfe, B.*, at fo. 122. No question was raised between' freehold and chattel rents, but between rents *reserved* by deed and those ancient rents existing as an inheritance *distinct from the land*. The question in fact was about the repugnancy of the Imperial clauses of the Statutes, represented by ss. 2 and 19 of the Con. Stats. U. C., ch. 88, and not at all relating to any question which is in controversy in this suit.

The conclusion, then, which I come to, from a careful perusal of all the authorities, and as careful a consideration of the whole case as I can give it, is, that the grantee by deed of a rent-seck out of a term for years can, by virtue of the 4 Geo. II. ch. 28, distrain for the same on the land which was charged with its payment before it was granted, and that McLean could, therefore, rightly distrain as he did on Hope, the tenant of the land. But it appears he cannot justify it or avow for it as if it had been a rent-service, and as if his distress had been by a right possessed at the common law, but that he must avow for it as a rent-seck distrained for specially under the provisions of the Statute, unless the general issue by Statute, under the 11 Geo. II. ch. 19, meets this case as well as rents-service.

It was suggested that the plaintiff should amend his count by alleging the rent to have been payable, as the fact was, to McLean, and by adding an averment also that he, the plaintiff, not having notice of such grant of the rent, paid the same to White, the lessor, before distress was made for the same. This has not been done. He may, however, still contend that the allegation is correct as it is; for so long as he had no notice of the transfer to McLean, he may say he was right in treating the rent as still payable to White, the lessor.

As a fact, the rent was not payable to White, but to McLean; and it appears to me the truth should be stated.

As to the defendant protecting himself by his present plea, it is the 11 Geo. II. ch. 19, sec. 21, which gives the right of pleading the general issue. Some sections of this Act, for instance, selling and impounding on the premises (sec. 10) are applicable to rents-charge, and therefore to rents-seck: *Johnson v. Faulkner* (2 Q. B. 925); and section 21, which gives the general issue, should be applicable to them also. The last section is worded very comprehensively: "In all actions of trespass or on the case, to be brought against any person entitled to *rents or services of any kind*, relating to any entry, by virtue of this Act or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure of any goods or chattels therefrom, it shall be lawful for the defendant to plead the general issue, &c." McLean, as grantee of the rent, may, I think, defend himself under the general issue.

But the cases before mentioned, of *Pascoe v. Pascoe* (3 B. N. C. 898) and the others cited with it, shew the distress should have been specially avowed for in *replevin*. This is not *replevin*, but trespass, and therefore within sec. 21 of the 11 Geo. II. ch. 19, giving the defendant the right to plead the general issue.

The parties have tried this case throughout upon McLean's right to distrain, either in his own name or White's, for the rent in question. In my opinion he had that right.

I think, also, that the plaintiff fails, because the rent was not, as is alleged in the declaration, payable to White, but to McLean; and it is just as erroneous to represent it as still payable to White, as it would be to represent a negotiable note as payable to a certain indorsee after he had specially indorsed it over to another. The fact that the plaintiff did not know of the assignment cannot alter the fact as to averments of pleading, however good a defence it would have been to the plaintiff against McLean's distress, if he had paid White without notice of it; but, as

the defendant did not take the objection, we give no judgment upon it.

As the rule is for a non-suit, I think a non-suit should be entered.

Rule absolute for non-suit.

IN RE MOORE V. LUCE.

Insolvency—Debt not matured—Right of creditor to commence proceedings.

Under the Insolvent Acts of this Province a creditor, whose debt is immatured, may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time. But, in this case, it appearing that the debtor did not owe more than \$100 beyond the creditor's debt, none of which was at the time due, and a portion not payable for several years to come, the Court directed that he should be allowed further time to shew, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation.

A writ of attachment in insolvency was issued on the 25th of March, 1868, on the usual affidavits. The principal affidavit was made by R. P. Luce, the agent of the creditor, who stated, among other facts, that John R. Moore "is indebted to the plaintiff in the sum of eight hundred and sixty-six dollars and sixty-five cents, currency, for principal money accruing due upon eight promissory notes, hereunto annexed, made by said defendant: to the best of my belief and knowledge, the defendant is insolvent."

This affidavit was made on the 9th of March, 1868.

The first note was as follows:

"\$100.—Two years after date, for value received, I promise to pay to Luce Brothers, or bearer, one hundred dollars, with interest at the rate of eight per cent. per annum until paid.

"JOHN R. MOORE."

The first note and the seventh were payable to Luce Brothers, or bearer, and both were stated to have been endorsed to T. J. Luce.

The first six notes were dated the 14th of November, 1866. The seventh and eighth notes were dated the 19th of November, 1866.

The first six notes were for \$100 each.

The seventh note was for \$128.

The eighth note was for \$138.65.

The first note was at eight per cent. generally. The remaining seven notes were at eight per cent., payable annually.

The first note was payable at two years, and each of the other notes was payable respectively at three, four, five, six, seven, eight and nine years.

The debtor petitioned the Judge, on the 28th of March, 1865, to set aside the attachment, because his estate had not become subject to compulsory liquidation, as he was quite solvent, and the notes mentioned were not due.

The petition was argued before the learned Judge in the Court below, and he decided that by the Act of 1864, sec. 12, sub-sec. 5, the plaintiff was a *creditor*, and, being a creditor, he could establish his claim under sec. 3, sub-sec. 7; that he was not required to shew his debt was overdue, or that he had an existing cause of action at law; that *Phillips v. Poland*, L. R. 1 C. P. 206, placed a construction on the term *creditor* as applicable to the English Bankruptcy Act of 1849, sec. 112, which shewed that it meant, as to that Act, a person who could come in under the Act and have the benefit of it; that *Wood v. DeMattos*, L. R. 1 Exch. 91, decided the same as to the term creditor under the 24 & 25 Vic. ch. 134; and that the plaintiff could certainly prove his claim under the Statute, on proceedings taken by another creditor.

The petition was thereupon dismissed with costs, as well on the law as on the merits.

The defendant appealed to this Court to revise and reverse the decision of the Judge, and that it might be declared his estate was not, under the circumstances set forth in the affidavits on which the attachment was granted, subject to compulsory liquidation; and that all

proceedings therein might be set aside, with costs to be paid by the plaintiff, and that all the defendant's property and rights might be re-vested in him, in the same manner as if the attachment had not been issued.

In Easter Term last, *Street* appeared for the appellant :—

The main question was, whether proceedings under the insolvency law could be taken by a person who had a claim against another before the claim was due; whether such person was a *creditor* under the Statute, and the claim he had was a *debt*.

The English Act, 7 Geo. I. ch. 31, sec. 3, enabled creditors, whose debts were not due, to rank as creditors, but it prohibited them from being petitioning creditors: *Ex parte James*, 1 P. Wms. 610.

The Judge in the Court below relied on sec. 12, sub-sec. 5, and sec. 3, sub-sec. 7, and two late English decisions giving a meaning to the word *creditor*, in coming to the conclusion which he did.

Harrison, Q. C., contra :—

The fact that the section of 7 Geo. I. ch. 31, prohibited creditors, whose debts were not due, from becoming petitioning creditors, shews that but for the enactment they could have been such petitioners.

This section, too, was also expressly repealed by the 5 Geo. II. ch. 30, and therefore a creditor, whose debt was not due, could after that be a petitioning creditor, as was held in *Ex parte Douthat*, 4 B. & Al. 67.

The word *creditor*, under the Bankruptcy Acts, means a person having a claim, who can prove for it and claim the benefit of the Act: the cases referred to in the Court below shew this: L. R. 1 C. P. 204; L. R. 1 Exch. 91.

In addition to the section of the Act of 1864, referred to in the Court below, sec. 5, sub-sec. 2, expressly names "debts due, but not then actually payable."

A claim not due may be a debt, and though not due may be attached under the garnishment enactments: *Jones v. Thompson*, E. B. & E. 63.

By the English Bankruptcy Act of 1849, sec. 91, a cre-

ditor whose debt is not due may take initiatory proceedings: the same construction should be placed on our Acts. It was not an unreasonable proceeding, for a debtor should not be allowed to waste his estate to defraud his creditors, merely because the day of payment had not arrived.

Street in reply :—

Creditor is used in the Statute to describe one who can prove a debt, in distinction to one whose claim is not an absolute one, but contingent only.

A. WILSON, J., delivered the judgment of the Court.

The question is one of novelty with us, and it is of great consequence it should be settled, both as respects debtors and creditors.

If our Insolvent Act is expressed, and is to be construed in the same way as the English Bankruptcy Acts, the policy of both being alike, the decision appealed from must stand.

Before the passing of the English Statute 7 Geo. I. ch. 31, none but creditors whose debts were due at the time of the act of bankruptcy committed were entitled to prove for their debts, or to be petitioning creditors for the commission: *Tully v. Sparkes* (2 Ld. Ray. 1549).

The 7 Geo. I. ch. 31, enabled creditors, who had security in writing, to prove for their debts, though not due when the bankruptcy was committed, but it precluded such creditors from being petitioning creditors.

By the 5 Geo. II. ch. 30, sec. 22, this disability was removed, and under it the case of *Ex parte Douthat* (4 B. & A. 67) was decided.

The Statute of Geo. II. was confined to creditors who had security in writing for their debts. If the creditor, therefore, had a debt for goods sold and delivered, which was not due, but no agreement or note in writing for the amount payable at a certain time, he could not prove in respect of such debt: *Hoskins v. Duperoy* (9 East. 498); *Price v. Nixon* (5 Taunt. 338).

The 6 Geo. IV. ch. 16, sec. 15, enabled every creditor,

whose debt was not due at the time of the bankruptcy committed, to prove his debt or petition for a commission, whether he had a security in writing or not for his debt, and the 12 & 13 Vic. ch. 106, sec. 91, is to the same effect.

The question, then, is, does our Insolvency Act permit a person, whose debt is not yet due, to make his debtor an insolvent in respect of that debt?

This power can only be exercised, if expressly or by plain implication it has been conferred on the creditor, for without it he can have no such power.

It is quite clear that debts not due may be proved against the estate by the direct language of the Statute, and this goes far to establish the right to commence proceedings for them; for, as said by Abbott, C. J., in 4 B. & C. 71, in relation to the 7 Geo. I. ch. 31, and the 5 Geo. II. ch. 30, and some years before the 6 Geo. IV. was passed, "No distinction can now be taken between a proveable debt and that of the petitioning creditor."

The different parts of the Act of 1864, which apply to the question, are the following: Sec. 2, requires the person making a voluntary assignment to exhibit a statement to the creditors shewing, among other things, the amount due to each, "distinguishing between those amounts which are actually overdue and those which have not become due at the date of such meeting."

The form B in the schedule shews the distinction made, not as to direct liabilities, which is strange, but as to *indirect* liabilities, maturing *before* and *after* the day fixed for the first meeting of creditors.

The form of oath of the insolvent immediately following this schedule states, "That all the above mentioned liabilities are honestly *due* by me, and that none of them were created or have been increased with the intention of giving to the creditor thereof any advantage *either in voting at meetings of creditors or in ranking on my estate.*"

Sec. 2, sub-sec. 3, also refers to direct liabilities *then actually overdue*: on such latter securities the creditor may vote, but not on indirect liabilities which are not due.

By sec. 3, sub-secs. *b, c, i*, a creditor, whose debt is not due, may be injured, and under them he may state, in respect of his immatured debt, a cause of insolvency which affects him equally with a creditor having a claim which is past due.

The affidavit the creditor has to make, by the form given under sub-sec. 7, when he applies for a warrant against his debtor, is that "the defendant is indebted to the plaintiff" in a particular sum, stating the value of the debt, and, to the best of the creditor's belief, that the defendant is insolvent within the meaning of the Act, and has rendered himself liable to have his estate placed in compulsory liquidation. The 7th sub-sec. does not use the phraseology that the defendant *is indebted* to the plaintiff, which the form does, but that the plaintiff *is a creditor* of the insolvent; no doubt very different language; but the statement that the insolvent *is indebted* may be read by the light of the Statute, which in effect makes an undue debt to be due, and so the party *indebted* for the purposes of the Act.

By sec. 5, sub-sec. 2, "all debts *due and payable* by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this act, and all debts *due, but not then actually payable*, subject to such rebate of interest as may be reasonable, shall have the right to rank upon the estate of the insolvent."

By sec. 9, sub-sec. 3, the consent in writing of the proportion of creditors specified to the discharge of a debtor "absolutely frees and discharges him from all liabilities whatsoever [except those hereinafter excepted] *existing against him and proveable against his estate, whether such debts be exigible or not* at the time of his insolvency, and whether direct or indirect;" and, lastly, the word *creditor* by sec. 12, sub-sec. 5, shall be held to mean "every person to whom the insolvent is liable," whether primarily or secondarily, and whether as principal or surety.

The respondent was certainly a *creditor* of the appellant

at the time when these proceedings were taken: he had a direct and primary liability against him: his claim was *due* under sec. 2 and the oath to Form B, and under sec. 5, sub-sec. 2; although, according to sec. 2, *not actually overdue*, or according to sec. 5, sub-sec. 2, *not then actually payable*, or according to sec. 9, sub-sec. 3, *whether exigible or not*; and such a debt he would be barred by the discharge under the last mentioned section from ever enforcing against the appellant, because by that section, and also by sec. 5, sub-sec. 2, it was proveable against and entitled to rank upon the estate of the insolvent.

The consideration of these enactments of the Statute leads us to the conclusion that our Insolvent Act must in this respect be construed as the Bankrupt Acts are in England, and that a creditor having an immatured debt may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time, although there is no direct enabling clause to this effect in the Statute, as there is in the English Acts.

The right exists, by virtue of his position as a creditor, and to prevent the exercise of this right would require a disqualifying clause such as was originally contained in the Act of 7 Geo. I. ch. 31.

The averment in the affidavit of the creditor before alluded to, that the insolvent *is indebted* to him, must be construed according to the general tenor, effect and purpose of the Statute; and by the Act the insolvent *is indebted* to him. The expression cannot, then, be said to be inconsistent with the purview and intent of the Act.

Under the words "all debts owing or accruing," that which is *debitum in presenti*, though *solvendum in futuro*, is attachable: *Jones v. Thompson* (E. B. & E. 63); *Dresser v. Johns* (6 C. B. N. S. 429).

The cases referred to by the learned Judge in the Court below, of L. R. 1 C. P. 204, and L. R. 1 Exch. 200, show that the word *creditor* as used in the Bankrupt Acts is not applied to all persons who are creditors; that it does not

apply to a person who recovered judgment for a debt contracted after the debtor became a bankrupt, but to a creditor "who can come in under the bankruptcy and have the benefit of it, whether his claim be strictly a debt or not."

The judgment of the learned Judge of the County Court has been very carefully prepared, and is fully and satisfactorily sustained by his reasoning.

As to the merits,—the application to have the proceedings set aside, because the respondent was not in fact insolvent, or amenable to the Act; we think that evidence of the facts contained in the petition might have been and may still be admitted; and no doubt, where the effect of such proceedings is to accelerate the payment of a debt but lately contracted, by several years, they should be looked upon with that natural degree of suspicion which so great an advantage to the creditor unavoidably creates. We are of opinion the appeal must be disallowed, excepting that the debtor should be allowed a further time to sustain the allegations of his petition, if he can; upon which the learned Judge, after hearing the testimony on both sides, legally advanced and admissible, will of course pronounce his own opinion. We should not probably require this to be done in an ordinary case; but in so unusual and peculiar a one as this is, and the debtor not owing more than about \$100 beyond this creditor's debt, and having apparently quite a large property in possession, the very fullest opportunity should be offered to the debtor to scrutinize the proceedings of a creditor, whose interest is so obviously opposed to the delay of waiting for his debt until it is due, and is so plainly benefited by anticipating, if he can, the long day of payment he agreed to give.

Rule disallowing the appeal, excepting that the debtor be allowed a further day, to be named by the Judge of the County Court, to support his petition by evidence, if he can, and that the parties be then reheard therein on the merits; and on the whole, without costs, if the residuary proceedings be finally set aside by the learned Judge

below; but if they are directed to stand on such rehearing, the whole costs should be costs against the estate.

Rule accordingly.

BROWN V. MCCARTY

Replevin—Lease—Construction as to time of payment of rent—Distress—Pleading.

In replevin defendant avowed justifying under a distress for \$140 rent, due 1st May, 1867; under an indenture of lease, by which defendant demised to plaintiff for five years, to be computed from 15th March, 1867, at the yearly rent of \$280, payable 1st November and May during the term, excepting the last payment, which was to be paid on the 15th March preceding the 1st May.

Plaintiff pleaded, setting out the indenture in full, and alleged that only one instalment of rent had become due before action, which he paid defendant before distress.

Defendant replied that there were two instalments due before distress, on 1st May and November, 1867, and not one only as alleged:

Held, on demurrer, replication bad.

REPLEVIN.

Avowry, justifying under a distress for \$140 of rent due on 1st May, 1867, and due at the time of the alleged taking, under an indenture dated 8th September, 1866, by which defendant demised certain premises to the plaintiff for five years, to be computed from the 15th March, 1867, at the yearly rent of \$280, payable in even portions on the first days of November and May in each year during the continuance of said term, with the exception of the last payment in the last year of the tenancy, which was to be paid on the 15th of March preceding the first day of May.

The plaintiff in his plea set out the indenture in full, and alleged that before action, the 5th of February, 1868, only one-half yearly instalment of rent fell due, which plaintiff before distress paid to defendant.

The defendant replied that two instalments of rent fell due before the distress, on the first days of May and

November, 1867, and not one only, as alleged by plaintiff; wherefore defendant well avowed, &c.

Demurrer to replication, 1. That the allegation that two instalments of rent fell due before the distress, contradicted the legal effect of the lease; for by the lease it appeared that only one instalment had become due before the commencement of the suit, namely, the one which fell due on the 1st of November, 1867.

2. That the replication was a departure from the avowry.

3. That the replication admitted the payment of one instalment of rent, and yet avowed for the first instalment.

C. S. Patterson, for the demurrer:—

The first payment of rent did not become due till the 1st of November, 1867, and so no rent was due at the time of the distress.

The last payment of rent by the lease would certainly fall due on the 1st of May, 1872, if it were not specially provided that it should become due on the 15th of March, 1872.

It is of no consequence whether the lease, as is usually done, provides that the *first* payment of rent shall be made on the 1st of November, 1867, or enables the time when such first payment is to be made to be ascertained by any other means, as, by relation to the time of the falling due of the last payment, as in this case; and it is of some importance, in settling whether the first payment is to be made in May or in November, 1867, to observe that November is the period firstly mentioned in the lease.

Armour, contra:—

The first payment of rent by the lease was due on the 1st of May, 1867. That November is mentioned before May is of no moment: the Court will always place them in the order in which, by a just construction, they should properly stand.

The last instalment of rent, by the ordinary course of payments, would fall due on the 1st of November, 1871; but it, by the express terms of the lease, is to be paid on the 15th of March, 1871.

That this construction will make the November, or last payment, due before the May rent of 1871, namely, on the 15th of March, 1871, is of no weight, so long as it is the express agreement of the parties: *Hopkins v. Helmore*, 8 A. & E. 463; *McCallum v. Snyder*, 10 C. P. 191; *Joslin v. Jefferson*, 14 C. P. 260; *Huskinson v. Lawrence*, 26 U. C. 570.

A. WILSON, J., delivered the judgment of the Court.

We think there is no difficulty in construing this lease. The construction, if put upon it according to the defendant's argument, creates the incongruity that the *last* instalment, which he says would, but for the special period provided for it, have fallen due on the 1st of November, 1871, would be payable before the May rent of that year, that is, on the 15th of March, 1871, and one whole year before the lease itself will expire.

Such an arrangement might no doubt have been made, for the parties may make any bargain they please; but it would have been a purely capricious provision, without any end or purpose to answer.

But when the Court is asked to declare that they have made such an agreement, we must be quite sure that the language is very plain, which will authorize us to act with the like caprice.

The object of providing that the last payment of rent, which otherwise would have fallen due on the 1st of May, 1872, after the term had expired, should become due on the 15th of March, before the 1st of May, was to make such last payment fall due within the term in place of beyond it.

The express order of the months in the lease, by putting November before May, though the lease was to begin in March, is also plainly consistent with this reading of the lease, and is entitled to some weight; for, though by no means conclusive, "we may assume the days of payment are enumerated in the order in which they were to occur:" per Littledale, J., 8 A. & E. 466.

We think judgment must be for the plaintiff on the demurrer.

Judgment for plaintiff on demurrer.

THE CORPORATION OF THE TOWNSHIP OF BURLEIGH V.
CAMPBELL ET AL.

Timber limits—Road allowances—Right of licensees to cut timber on.

Licensees of the Crown of timber limits, covering allowances for roads, are not liable to be sued for cutting timber on such road allowances, under the authority of the Crown, when no steps have been taken by the Municipality to pass a By-law dealing with such timber.

The pleadings in this case, and the facts, so far as they establish the claim of the plaintiffs, are in effect the same as in the case of these plaintiffs against *Hales et al.*, reported in 27 U. C. 72, with this difference, that the timber trees, the subject of this action, were cut on the road allowances, in the new survey, or the northern division of the Township of Burleigh.

In this case the defendants gave evidence that they obtained the usual license from the Crown Timber Agent to cut timber on certain specified lots in the 7th, 8th, 9th, 10th, 11th, and 12th concessions of the Township of Burleigh, these lots running from No. 12 to 32, inclusive, in some of the concessions. The license was dated the 17th of July, 1865, and was in force to the 30th April, 1866, with leave to the licensee to remove the timber, saw logs, &c., through any ungranted or waste lands of the Crown.

The trees, the subject of this action, were cut in the winters of 1865 and 1866.

The Crown Land (not timber) Agent for the Township of Burleigh stated that he received the map of the new survey made by Fitzgerald, by which to sell lots in the northern division of the Township of Burleigh, in February, 1865.

The license issued by the Crown Timber Agent was according to the old survey and plan, and undoubtedly covered the land on which the timber, the subject of this action, was cut.

The learned Judge left it to the jury to say what was the value of the timber cut by defendants and their servants on these road allowances, according to the new survey, and they found for the plaintiffs \$300.

Hector Cameron obtained a rule *nisi* to enter a non-suit, pursuant to leave reserved, on the following grounds :

1. That the plaintiffs had no such title or interest in the road allowances as would enable them to recover in this suit, the freehold not being in them.

2. That the re-survey of the northern division of Burleigh was illegal, and, as in the old survey there was no road allowance on the banks of creeks and waters, if the new survey was illegal, the new road allowances around waters were also illegal, and the newly surveyed concessions and side lines, not being road allowances under the original survey, were illegal.

3. That there was no evidence of dedication of the land as to all allowances, and the road allowances around waters did not come within the provisions of the Municipal Act, not being used or intended to be used for the purposes of travel, and not being necessary for that purpose.

4. That the re-survey, not being an original survey, or a survey authorized by sections 6 and 11 Consol. Stat. U. C. ch. 93, no new road allowance reserved by it came within the Municipal Act.

5. That there was no evidence of a by-law having been passed making provision for dealing with the trees or timber, or for the preservation or sale of the same.

6. That there was no necessity for a road allowance along the margin of Eel Creek, and therefore the surveyor had no authority to lay out such allowance.

7. That the timber in question in this suit, having been cut under the authority of licenses from the Crown, granted

according to the old survey, after the new survey was made and reported to the Crown Land Department, constituted a defence to this action, and disproved any adoption of the new survey at that time ; and even if the new survey was afterwards adopted by the Crown, the right to cut the timber in question in this suit still remained under the old license, and could not be withdrawn by the Crown, except under the terms and circumstances provided by the license.

8. That the allowances or reservations along the creeks and waters were not actually laid out on the ground as road allowances.

Or for a new trial on the grounds aforesaid, and on the ground that there was no sufficient evidence given by the plaintiffs to charge the defendants with the trespasses sued for ; for misdirection of the learned Judge in ruling that the plaintiffs were entitled to recover in this suit, and that defendants were liable for the trees cut by Hales, in consequence of having given Hales a list of lots according to the old survey, although the license was granted by the old survey, and Hales was cutting under a contract to deliver sawn timber, and was not employed by defendants ; and for excessive damages.

During the term, *C. S. Patterson* shewed cause :—

Under the Municipal Act, as it now stands, the soil and freehold of these road allowances are in the municipality. Since the decision in the case *Municipal Council of Sarina v. The Great Western Railway*, 17 U. C. 65, the Municipal Act has been changed, and the effect is to vest all government road allowances in the local municipalities.

At all events, these plaintiffs have such an interest in the trees standing on road allowances as will enable them to maintain this action. That is decided in the case of these plaintiffs against Hales, 27 U. C. 72, and was acted on in this Court in granting the new trial in this cause.

As there had been no lots granted in that part of the Township, now called the Northern Division, the Crown had a perfect right to make the new survey.

As to making allowances for roads, when necessary,

under the instructions to the surveyor in making the new survey, the surveyor was to judge of its necessity. It is not found as a fact that the reservation as to the particular stream referred to in this case was not necessary, and it was not asked that that question should be left to the jury.

The following cases in this Court may be referred to as shewing the right of Municipal Corporations to maintain actions in reference to injury to bridges and highways, and their liability to be sued for neglect in keeping them in repair: *Corporation of Wellington v. Wilson et al.*, 14 C. P. 299, S. C. 16 C. P. 124; *Corporation of Thurlow v. Bogart*, 15 C. P. 1; *Harrold v. The Corporation of the County of Simcoe and the Corporation of the County of Ontario*, 16 C. P. 43, S. C. in Appeal, 17 C. P.

S. Richards, Q. C., contra :—

When the road is laid out by an individual, the soil and freehold are in him, subject to the right of the public to use the road for a highway: when the original allowance is made by the Crown, as to those allowances then, the soil and freehold are in the Crown. The judgment of the Court of Queen's Bench, in the action brought by these plaintiffs against Hales, affirms this.

There is no doubt that at Common Law trees growing on a public highway belong to the owner of the soil, though the use of the highway may be dedicated to the public.

The case decided in the Court of Queen's Bench only went to the extent of holding that, as against a mere wrongdoer, the municipality might maintain the action, and this view may be sustained consistently with the rights of the owner of the soil to sell or remove the timber under the 336th sec. of the Municipal Act, as it stands in the Consolidated Statutes of U. C.

The Crown, by authorizing the removal of the timber, is only doing an act that will aid in opening up the highways.

The license granted by the Crown Timber Agent under the operation of Consol. Stat. of Canada, cap. 23, had the effect of passing the property in the trees situate on these

allowances for road to the defendants: *McMullen v. McDonell*, 27 U. C. 36.

The power conferred on the municipality under sub-sec. 5 of sec. 331 of the Municipal Act, as consolidated by cap. 54, of Consol. Stat. of U. C., only gives power to the township to pass by-laws for preserving or selling timber, trees, stone, sand or gravel, on any allowance or appropriation for a public road. Until the by-law is passed, at all events, the property in the trees remains in the owner of the soil, the Crown, and no one can prevent the owner from removing that which did not interfere with the free use of the road as a highway: *Hopkins v. Mayor of Swansea*, 4 M. & W. 621.

The Municipal Act says roads laid out, or hereafter laid out, must mean in the original survey of a township, or the original survey of a township to be hereafter surveyed. This new survey cannot be held valid to the prejudice of the defendants: *Corporation of Peterborough v. Smith*, 25 U. C. 453.

Hector Cameron (on the same side):—

The defendants cannot properly be wrongdoers until the plaintiffs exercised the power to sell the timber, if they would be then: *Badger v. S. Y. N. Co.*, 1 E. & E. 347; *Mon. Canal Co. v. Hill*, 4 H. & N. 427; *Addison Torts*, last ed. 237, 830.

RICHARDS, C. J., delivered the judgment of the Court.

We shall follow the judgment of the Court of Queen's Bench in these plaintiffs v. *Hales et al.*, cited on the argument, and hold, for the purposes of this suit, that the soil and freehold of these allowances for road in the new survey of that portion of Burleigh, in which the timber was cut, assuming them to be allowances for road within the Statute, are vested in the Crown.

We would undoubtedly follow that judgment as to plaintiffs' right to recover against a wrongdoer, who had cut down trees on these road allowances, in the absence of any by-law on the subject; but we do not

think the same rule will hold good against the assignee of the Crown, to whom these trees have been assigned for a valuable consideration, assuming, as we must, under the authority of the case referred to, that the Crown still owns the freehold of these road allowances.

The learned Chief Justice undoubtedly had presented to his mind the rights of the Crown in reference to these allowances, and intended to confine his judgment in that case strictly to the facts before him.

The defendant there appeared to be a mere wrongdoer. He says, "We are not prepared to hold that a settler, who cut down trees on an allowance for road *bonâ fide*, for the purpose of access to the lot, on which he was settling, was liable to the Crown, or any one else, as a wrongdoer;" and again, "It appears to us that, to enable them (the municipality) to enjoy the full advantage which the Legislature meant to confer, they must also have the right to recover from a wrongdoer the value of such timber when he cuts and takes them away."

We think it consistent with the general principles of law applicable to this subject to hold, as against the party who cuts timber on these road allowances, under the authority of and by license of the Crown, in whom the soil and freehold of the road are vested, that no action can be maintained, when it is not shewn that the municipality has in any way exercised the powers they have of making a by-law on the subject.

We do not think it was the intention of the Legislature to make the holder of timber licenses from the Crown in a township, which may have but two or three inhabitants settled within its borders, liable as trespassers for cutting these trees, for which they pay a duty to the Crown, merely because such township, with half a dozen others similarly situated, may be attached to some other township sufficiently populous to form a municipality as united townships. The effect of this would be to give a considerable portion of the revenue of the Crown domain for the benefit not of those who resided in the townships where

the timber is cut, but in an adjoining township to which they are attached.

We cannot consider the person, who purchases these trees from and obtains a license to cut from the Crown, as a wrongdoer. If we do, I suppose we must be prepared to hold that if the Government wished to construct a slide on any part of the shores of Eel Creek, along the bank of which a road allowance of one chain wide was left (on which a considerable portion of the timber, the subject of this action, was cut,) their officers would be liable as trespassers in cutting timber upon this road allowance for the purpose of making these improvements.

On the whole, without going into the other questions raised in the rule, if there was leave reserved to enter a nonsuit at the trial, the rule should be made absolute for that purpose.

Rule absolute to enter nonsuit.

STRICKLAND ET AL V. VANSITTART.

Principal and agent—Excess of authority—Entire contract—Principal not bound.

Defendant's agent, having without authority contracted in writing to sell to plaintiffs *all* the pine timber on certain lands belonging to defendant, both the standing timber and that cut after a date named, as to the latter of which his authority was undisputed, received from plaintiff \$75 on account of the agreement, with the private and verbal understanding, that in case defendant's claim to logs cut *before* the date referred to could not be sustained, as turned out to be the case, the \$75 should be returned. It appeared that as soon as defendant was informed of the sale by her agent of the standing timber to plaintiffs, she at once repudiated it, and in fact that plaintiffs had been aware, when they entered into the agreement, that the agent had no authority to sell it. In an action against defendant to recover back the \$75 paid to her agent, which the latter retained in his hands, *Held*, that the contract was an entire one, and that plaintiffs could not recover against defendant, but that their remedy, if any, was against the agent.

The first count of the declaration was on an agreement, dated 14th January, 1867, between plaintiffs and defendant, relative to the purchase of logs.

Second count, for money paid by plaintiffs for defendant, at her request, money had and received by defendant for the use of the plaintiff, interest, and account stated.

First plea, to first, second, and third counts of the declaration, did not agree as alleged.

Second plea to first count, that there was not on any of the said lands, or adjacent thereto, to wit, 2,000 logs that were cut off the said lands since 1st November, in manner and form as alleged, which defendant alleged to be her own property absolutely.

Third plea to second count, that there was not at the time of the making of the said agreement a large quantity, to the number of 2,000, that had been removed off and from the said lands subsequently to the said 1st day of November in manner and form as alleged, and which defendant then represented to be her own property absolutely.

Third plea to fourth count, never indebted.

The cause was taken down to trial at the last Fall Assizes for the County of Peterborough, before Adam Wilson, J.

It appeared that the defendant, in the year 1864, had sold to one McLennan all the white and red pine, oak and elm trees, or the timber to be made therefrom, on certain lots of land in the Township of Bexley, for \$1,300, with the privilege up to the 1st of November, 1866, to enter on the said land and remove the timber, with liberty to keep the timber on some convenient part of the land for a sufficient and reasonable time, to enable him to remove the same. This agreement had been assigned by McLennan to one Smith, who, prior to 1st November, 1866, had cut on these lands about 3,000 pieces of saw-logs. The defendant contended that Smith had no right to remove these logs after the 1st of November, and that they belonged to her, and she was desirous that the land should be watched to prevent the logs being removed. On the 23rd of November she appointed Mr. Orde, of Peterborough, her attorney, to exercise the general control and supervision of her lands in Bexley, or elsewhere in the said

County, to prevent and hinder by all lawful means the commission of any trespass or waste on the same, and to sue for, recover, receive, and compound for any damage which might occur by means of the commission of any trespass on the said lands, or any part thereof, or for any other matter or thing whatsoever connected therewith, by any person or persons whatsoever, &c., &c.

A short time before the 9th of January defendant wrote Orde, stating she was anxious to know what he was doing about the cut timber, asking if he had closed with Strickland, and what he was paying down, directing him, if it was necessary to restrain Smith from moving the logs, to get an injunction, and wishing him to make the best bargain he could for her, and to save her all expenses that could possibly be helped.

On the 9th of January she again wrote him, referring to her letter about selling to Mr. Strickland, and said: "I do not wish to sell the standing timber at present." She then spoke of getting an injunction to prevent Smith from taking the logs off the land, and added, "I feel very anxious about the cut timber. How can you prevent Smith from taking it away? * * * You assured me that you could save it for me, and I trust to you to do so."

On the 14th of January, Orde, in defendant's name, signed an agreement with the plaintiffs, acknowledging to have received \$75 on account of purchase by them of all the pine timber on all the lands in Bexley belonging to defendant, and lately under lease to McLennan, including all the saw-logs cut or removed from said lands since the 1st of November, together with all the remaining standing pines on said lands, to be paid for at the rate of ten cents per standard log, each standard to contain two hundred and fifty feet board measure, plaintiffs to have to the 1st of May, 1869, to remove said pine, each season's cutting to be paid for at the said rate by the 1st day of April each season, defendant to give plaintiffs quiet and peaceable possession of the same, and to execute proper conveyances

in duplicate for registration as soon as defendant conveniently could.

Orde proved the signing of the memorandum, not under seal, by himself, as attorney for defendant. He said he was aware that Smith claimed all the logs cut on the place before the 1st November, 1866, and application was to be made for an injunction to restrain him from removing the logs; that he gave plaintiffs to understand, before they entered into the agreement, there would be trouble with Smith about logs cut before 1st November, 1866; that he was negotiating with plaintiffs to purchase what logs were cut after 1st November, 1866, and they were to purchase those only cut after 1st November, 1866. Orde was under the impression that logs cut before could not be removed from the land after 1st November, 1866, as Smith would be a trespasser in doing so. The private understanding between Orde and the plaintiffs was that the \$75 were to be returned if claim to the saw logs could not be maintained. An injunction was applied for against Smith, but the application was not successful. He stated that defendant repudiated his authority in making the agreement with the plaintiffs, and that the \$75 were still in his hands, subject to his claim against her. It was understood that if defendant did not approve of his sale of the standing timber, it was to be struck out of the agreement, and she did not approve of it.

A person employed by Orde stated that he could find no timber cut on defendant's land after 1st November, 1866; that the timber would be worth, standing, ten to fifteen cents a log, and, skidding, fifteen cents more, altogether thirty-five to forty cents each log when on the skid.

On the 28th of January defendant wrote Orde, amongst other things, "I have no objection to sell to Mulholland; on the contrary, I prefer selling to him; but you may easily imagine that I am not going to all this expense and trouble to put my timber into his or any one's hands for a mere nothing, and certainly not without the cash paid down at the time of purchase. As to the standing timber,

I positively forbid its being sold to any one. If I sell at all, it will be after all this business about cut logs is settled. I prefer to see how I am treated about the logs before I risk anything else. I beseech you not to compromise me in anywise with respect to the standing timber."

The defendant's counsel objected at the trial that the contract of 14th January was entire, and as Orde had no authority whatever to sell the standing timber, the whole contract fell through.

2. The agreement was never completed. It was provided that the \$75 should be returned to plaintiffs, if she could not maintain her claim to the logs, and she was not able to maintain it.

3. The agreement was not complete, for it provided for a conveyance to be executed and a covenant for quiet enjoyment to be given.

4. As to first count, it failed on the evidence, and as to the second and third counts, Orde had no authority to provide for giving quiet possession of the property.

As to the fourth count, it was not sustainable, for Orde had no authority to receive money on account of standing timber.

The learned Judge directed a verdict for the defendant, with leave to plaintiffs to move to enter a verdict for them for \$75 and interest, if the Court should be of opinion that they were entitled to recover on any of the counts.

Scott obtained a rule *nisi*, pursuant to leave, to set aside the verdict as to the second, third and fourth counts of the declaration, or some one of them, and to enter a verdict on all or any of them for the plaintiff for \$75 and interest, from 14th July, 1866 (should be 14th January, 1867), on the following grounds:

1. The agent being authorized to enter into the contract produced, so far as related to the fallen timber, the money being paid generally on account, should be considered as paid for the fallen timber, which alone he was authorized

to sell, and for which alone he was authorized to receive money for the sale of; and the agreement should be considered as a contract in fact by the defendant for the sale of the fallen timber at a certain price, as a part of which the \$75 were paid, and the evidence shewed the defendant had no title to the fallen timber at the time of the agreement, or subsequently.

3. If the verbal understanding had, at the time the agreement was entered into, been allowed to be considered, it shewed the money was to be returned in the event of the defendant not getting possession of the timber, of which timber she did not get possession, and to which she had no right.

4. As to the third count, the agreement to execute proper conveyances applied as well to the fallen as to the standing timber, and as to this there was a breach, as the defendant could not execute a proper conveyance of what did not belong to her.

5. As to the fourth count, the money being paid, under the circumstances, without consideration, supported the count for money had and received by the defendant to the plaintiff's use.

J. D. Armour shewed cause:—

The contract is an entire one for the sale of all the timber cut or removed off the defendant's lands, and of the standing timber at ten cents per log. Without the standing timber the cut logs were proven at the trial to be worth from thirty-five to forty cents a log, and this shews that, though the entire contract might be just towards the defendant, yet, if her agent had power to make it, making it a contract for the lying timber alone, it would compel her to sell these logs at ten cents each, which were shewn to be worth thirty-five or forty cents a piece.

It being an entire contract, the agent having no power to enter into it, it is not binding on the defendant at all; and as she repudiated it when first brought to her knowledge, she cannot now be bound by it; and as she did not authorize the agent to make such a contract, she did

not authorize him to receive any money for her on that contract. He not having received the money for her, she is not liable to the plaintiff for it. The remedy is to sue the agent, who had no authority to enter into the contract: *Story on Contracts*, 4 ed., secs. 21 to 25.

Spencer, contra:—It was admitted the agent had authority to sell the down timber, and as all the down timber had been removed from the place before the agreement was entered into, there was no consideration for the money paid, and it ought to be returned: *Story Agency*, secs. 134, 135, 137.

By the terms of the agreement, the standing timber was *not* to be paid for *until it was cut*; the money was therefore paid for the fallen timber, which the agent was authorized to sell. From the evidence, if defendant failed to establish a title to the down timber, the money was to be returned: *Chitty Contracts*, last edition, 576, 577; *Addison Contracts*, 196, 267, 268; *Coe v. Clay*, 5 Bing. 440; *Allen v. Hopkins*, 13 M. & W. 94.

RICHARDS, C. J., delivered the judgment of the Court.

It was admitted on the argument that Mr. Orde had no authority to make the contract set up by the plaintiffs at the trial of this cause. The agreement itself seems to be an entire one for the sale of all the pine timber on all the defendant's lands in Bexley lately under lease to McLennan, including all the saw-logs cut on or removed from the said land since 1st November, 1866, and the \$75 paid to Mr. Orde were paid on that agreement. The defendant's answer appears to be simple and conclusive: "I never authorized Mr. Orde to receive money for me on such an agreement, nor to make such an agreement for me; I have not, therefore, made that agreement, nor received that money."

The agreement being for the sale of all the timber, including all the saw-logs cut, &c., and all to be paid for at a certain uniform rate, how can the different descriptions of timber be separated, the cut from the uncut? The cut

logs being worth, according to the evidence, from thirty-five to forty cents each, and the price of all under the agreement being ten cents each, plaintiffs do not agree to pay thirty-five to forty cents each for the logs that were cut and skidded, nor did defendant or her agent agree to accept ten cents each for the cut and skidded logs only, supposing the agent had authority to sell them alone. The general doctrine as to rescinding contracts seems to be, that neither party can rescind an entire contract in part and enforce it in part, and each party is liable for the whole consideration or none. When this contract in fact never existed as a legal contract, and the party intended to have been bound by it entirely repudiates it, I do not see how such party can be liable for the consideration which she never received, nor authorized any one to receive.

I am of opinion that plaintiffs cannot recover from the defendant in this action, and their remedy, if any, is against Mr. Orde. There seems, from the evidence, no reason to doubt but that plaintiffs were aware that Mr. Orde had no right to sell the standing timber, or to enter into a contract for that purpose.

Rule discharged.

McCABE, ADMINISTRATOR, v. ROBERTSON ET AL.

Deposit-receipt for money—Donatio mortis causâ—Gift inter vivos.

Plaintiff's wife held a Bank deposit receipt for \$1,000. Shortly before her death she directed the trunk containing this receipt to be sent for, or sent for it herself, at the same time expressing her intention of giving the receipt to the wife of defendant, and also delivering to her the key of the trunk. The trunk did not, however, arrive until after her death:

Held, assuming that plaintiff's wife could dispose of the money as if she were sole, that the instrument, not having been actually delivered by the donor before her death, did not pass to the defendant's wife as a *donatio mortis causâ*.

Held, also, that even if there had been an actual gift of the deposit receipt, with the intention of passing to defendant's wife the money mentioned in it, as a gift *inter vivos*, and she had accepted it, though there was no actual delivery, the gift, being a mere chose in action, would not pass as a mere gift *inter vivos*.

FEIGNED issue.

McCabe affirmed, and Thomas Robertson and Ann Jane Robertson denied, that a certain sum of money, to wit, \$1,000, deposited by Letitia McCabe, in her lifetime, in the Bank of Montreal, with the interest which had accrued thereon since the time of such deposit, was the property of the said James McCabe, as administrator, as aforesaid, against the said Thomas Robertson and Ann Jane Robertson.

The order for the trial of this issue was made by Adam Wilson, J., in a suit of this plaintiff against the Bank of Montreal, and was to try whether \$1,000 deposited with the defendants by Letitia McCabe, late the wife of the now plaintiff, deceased, was at the time of the order being made (13th April, 1863) the property of the now plaintiff *in his own right*, or in right of his own wife, as her personal representative, against the said Thomas Robertson and Ann Jane Robertson, his wife, or of either of them, in right of the said Ann Jane.

The cause was taken down to trial at the last Spring Assizes for the County of Wentworth, held before Morrison, J.

The plaintiff proved he was administrator of Letitia McCabe and rested his case there, claiming a verdict.

The defendant objected that he should have shewn the time of the deposit, but the learned Judge over-ruled the objection.

The deposit receipt was put in, dated Toronto, 4th September, 1867, for \$1,000, purporting to have received from Letitia McCabe \$1,000, which should be accounted for by the Bank to "the said Letitia McCabe: this receipt to be given up to the Bank when payment of either interest or principal is required."

On the back of this was indorsed, "Pay A. J. Robertson or order." This was proved to be in the hand-writing of one George M. Hewson. Then followed the signature, "Letitia McCabe." No evidence was given as to whose hand-writing this was in.

Hewson stated that about three weeks before Letitia McCabe's death she shewed him the outside of a paper, and asked him to write "Pay Ann Jane Robertson" on the back of it, and he did so. He understood Mrs. Robertson was Letitia McCabe's sister. Afterwards witness said to her that the Robertsons were not well off, when Mrs. McCabe said she was going to make Ann Jane Robertson better off; that she had separated from her husband, and she had her share "here," pointing to her bosom, where she had the paper: she said she had sold a tavern stand, and had divided with her husband. She was in very ill health when he wrote the order on the back of the receipt. He did not know if Mrs. McCabe could write or not: she did not write her name on the receipt when he wrote the order on it.

The daughter of the defendant said that before Mrs. McCabe died she was telling her mother about the receipt; she said the key was in her satchel; to get it and take the receipt out of the trunk, which was at James Robertson's, her uncle's, about three miles off; to send for it, and take the receipt out of it; that it would pay her for her trouble. She said that her (witness's) mother was to get the money mentioned in the receipt; that she said a couple of hours before her death her mother was to have the money for her trouble.

A son of defendant's went to James Robertson's after the trunk, and brought it about a quarter of an hour after Mrs. McCabe's death. It was by Mrs. McCabe's order that defendant's son went for the trunk. Before she sent for it she said Mrs. Robertson was to have the money; that the receipt was there (in the trunk) and she might have it.

Mrs. Letitia Robertson, a sister-in-law of defendants', said that she was present when the receipt was taken out of the trunk: that she saw writing on the back of it: could not say if the name, "Letitia McCabe," was on it then or not: she did not have the paper in her hands: could not say if the signature on the back was hers: she had no children.

The witness and defendant's daughter said the trunk was brought home before Mrs. McCabe's death, but Amelia Robertson, the daughter, on examination, said, "The trunk was at my uncle's, about three miles off, and my brother went for it and brought it back about a quarter of an hour after my aunt's death." Letitia Robertson said, in cross-examination, she died about quarter of an hour after the trunk arrived. This probably should have been before the trunk arrived; for James Robertson, at whose house the trunk was, went over to defendant's house with it, and said he arrived there about a quarter of an hour after Mrs. McCabe's death.

It was left to the jury to say whether the indorsement on the deposit receipt was signed by her, or by her instructions, during her lifetime.

The jury found for the defendant, that the indorsement on the deposit receipt was signed by the intestate.

Freeman, Q. C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence; and for misdirection in leaving it to the jury to determine whether the receipt had been endorsed by the deceased or not; and for a new trial on the ground that, whether endorsed or not, the money mentioned in the receipt remained the property of the plaintiff; and on ground of surprise as to

the endorsement, and on affidavits filed, that the endorsement was not in the hand-writing of the deceased. The affidavit filed was that of Mr. Evans, a barrister, who stated he was well acquainted with Mrs. McCabe's signature, and that she wrote with a tremulous hand. He gave an illustration of her signature, not at all like the endorsement.

M. C. Cameron shewed cause :—

Plaintiff sues as administrator of his wife, and cannot claim that the property in the money is in himself. If he does, the Married Woman's Act vests it in her, and she could dispose of it as she thought proper. The effect of the Married Woman's Act is to make her as to this property sole, in which case a gift of it would pass the property to defendant's wife. There was evidence to go to the jury: they have found for defendant, and there is no reason why a new trial should be granted to give plaintiff another opportunity of establishing his right. The female defendant is the sister of the deceased: she wished the money to go to her. Plaintiff was shewn to be a dissipated man: he and his wife had separated and divided the property, and the Court should not aid him to get this money from the person to whom she desired to give it. The delivery of the key gave possession of the trunk and the contents.

Freeman, Q. C., contra :—

This receipt being in the possession of the defendant, plaintiff could not know there was any endorsement on it, and when produced at the trial there was no evidence to shew it was endorsed by Mrs. McCabe. There is, therefore, no evidence to sustain the finding of the jury as to that point. The affidavit filed by plaintiff shews the endorsement is not that of Mrs. McCabe.

The receipt was not delivered during the lifetime of the parties, even if that would pass the property, and as a married woman, she could not have disposed of the money by gift or otherwise either at Common Law or under our Statute. There was nothing shewn at the trial as to the time and the manner, or if any settlement was made. He

referred to *Blain v. Terrybery*, 9 Grant, 286; *Williams on Personal Property* 311-312; *Bryson v. Brownrigg*, 9 Vesey, 1; *Shower v. Pilck*, 4 Ex. 478.

RICHARDS, C. J., delivered the judgment of the Court.

The deposit receipt given by the Bank of Montreal is not payable to the bearer, and is not transferable like a promissory note. The property in it, I apprehend, would not pass by mere delivery, as it would in a promissory note, and if this instrument had actually been transferred to Mrs. Robertson, during the lifetime of Mrs. McCabe, by mere endorsement, it would not have vested the money in Mrs. Robertson. If the Bank of Montreal had, on presentation of the deposit receipt and the order on it, refused to pay it, she could not have sued the Bank in her own name, and Mrs. McCabe at any time before her death could have revoked the gift, if intended to be a gift *inter vivos*, because, being a chose in action, the property had not passed.

It was at one time considered doubtful if choses in action could be subject of a gift *de mortis causa*, because no property in the claim or debt they represented passed to the donee; but in *Duffield v. Elwes* (1 Bligh, N. S. 497) Lord Eldon came to the conclusion that a mortgage deed was the subject of transfer by mere delivery, a *donatio mortis causa*, reversing the decree of Sir John Leach, V. C., who had held the contrary doctrine. The case was decided upon the principle that by the gift of a bond or mortgage there is a trust raised, which a Court of Equity will enforce, by compelling the executors to allow the use of their names to enforce the security against the debtor, for the purpose of carrying into effect the intention of the donor. In the case of a gift *inter vivos* a Court of Equity will not compel a donor to complete his gift, nor an executor to complete the gift of his testator; but in case of a *donatio mortis causa* he may successfully invoke the aid of the Court of Chancery for that purpose.

Even if there had been an actual gift of the deposit

receipt, with the intention of passing to defendant's wife the money mentioned in it, as a gift *inter vivos*, and she had accepted it, though there was no actual delivery and that might not be considered necessary, if the donee had accepted the gift (see *Regina v. Carter*, 13 U. C. C. P. 611 and the authorities there cited on this point), still, being a mere chose in action, it would not pass as a gift *inter vivos*.

See *Edwards v. Jones* (1 M. & Cr. 226), where bonds endorsed to an individual, signed by donor, held not to pass *inter vivos*, and because intended to be a gift *inter vivos*, held not to pass as a gift *de mortis causâ*.

Then, is this a good gift *causâ mortis*? The authorities seem clearly to establish that it cannot be a good gift *de mortis causâ*, unless accompanied by an actual delivery. The evidence here shews that at the time that Mrs. McCabe directed the party to send for, or sent for it herself, the trunk containing the deposit receipt was three miles off, and it did not reach the house where she was until after her death; but at the time she sent for the trunk and expressed her intention to give the receipt to defendant's wife, she gave her the key.

In *Bunn v. Markham* (7 Taunton, 224) a person, supposing himself in *extremis*, caused India bonds, bank notes, &c., to be brought out of his iron chest, and laid on his bed. He then caused them to be sealed up in three parcels and the amount of the contents to be written on them, with the words "For Mrs. and Miss C.," the plaintiffs. He then directed the brother to replace them in the iron chest; to be locked up; the keys to be sealed up and directed to be delivered to J., his solicitor and one of his executors, after his decease; then replaced the keys in his own custody near the bed, and afterwards spoke of this property as given to the plaintiffs. It was held not to be *donatio causâ mortis*, for want of a sufficient delivery, and on account of the donor continuing in possession.

In *Jones v. Selby* (Prec. Ch. 300) it was held that the delivery of the key of a trunk, with words of gift of the

trunk and its contents, was a good delivery of a tally upon Government for £500 contained in the trunk. Lord *Hardwick*, observes that the transaction amounted to the same thing as a delivery of possession of the tally, provided it was in the trunk at the time.

In notes to *Ward v. Turner* (1 White and Tudor's Equity Cases, 605, 1 edition) it is stated, "The case of *Snellgrove v. Baily* (3 Atk. 214) has established that there may be *donatio mortis causâ* of a bond, though not of a mere simple contract debt, nor by the delivery of a mere symbol; so likewise of bank notes, and it seems also of all other notes or bills payable to the bearer.

See chapter in *Williams* on Executors on *donatio mortis causâ*, and the notes to the last American edition of that work, where there is a valuable and elaborate note reviewing the English and American decisions on the subject, communicated to the American editor by Messrs. Hood and Gowen of the Philadelphia Bar.

At page 693 of *Williams* on Executors, it is stated: "But where no property is transferred to the donee by the delivery of the subject, there can be no valid *donatio mortis causâ*. Thus, in *Ward v. Turner*, Lord Hardwicke held that the delivery of *receipts* for South Sea annuities was not such a delivery of the annuities themselves as to support the gift of them as a *donatio mortis causâ*; but he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation. On the same ground bills of exchange and promissory notes, *not payable to the bearer*, have been considered incapable of being the subjects of *donatio mortis causâ*." In a note reference is made to *Miller v. Miller* (3 P. Williams, 356) and *Tate v. Hilbert* (3 Vesey, Jr. 111). But see, contra, *Rankin v. Weguelin*; Chitty on Bills, p. 9, 2nd ed. See also *Story's Equity*, ch. 10, sec. 607. Reference is also made to *Moore v. Darton* (4 DeG. & Sm. 517), where a receipt for money borrowed, delivered to the agent of the borrower by the lender, on his death bed, stating he wished the debt to be cancelled, was held a

sufficient *donatio mortis causá*, on the ground, *semble*, that the document was essential to the proof of the contract of loan. Many of the decided cases in the American Courts are referred to in the American edition of *Williams* on Executors, at page 686 amongst others *Headly v. Kirby* (6 Harr. 326), in the District Court of the City and County of Philadelphia, where it was held that the note of a third party, payable to the deceased, on demand, but not negotiable, was a proper subject of a gift *causá mortis*. In the same case it was held that the delivery of a book containing an acknowledgment of money deposited with a Savings Fund Society was a sufficient delivery to pass the right to the money. The case was reversed in appeal, but, it was said, not on either of these points.

I think the authorities shew that the delivery of the instrument, as a gift *inter vivos*, would not pass the right to the money mentioned in it to the defendant's wife, and the further finding of the jury on the mere question of the signing of the endorsement does not sustain the verdict.

The earlier English authorities seem to shew that this, being a mere chose in action, would not pass the right to the money, if it had been actually delivered to defendant's wife by Mrs. McCabe before her death; but these authorities seem now entirely overruled by the more recent cases.

The case of *Rankin v. Weguelin*, (reported in 27 Beav. 309), decided in 1832 by Sir John Leach, who, as Vice-Chancellor in the Court below, decided *Duffield v. Elwes*, held that a gift of bills of exchange payable to the order of the donor, though not endorsed by him, passed as a *donatio mortis causá*.

The decision by the Vice-Chancellor was, that a mortgage security could not by law be given as a *donatio mortis causá*; but this decision was reversed in the House of Lords (1 Bligh, N. R. 498). Of this case Vice-Chancellor Stuart, *In re Patterson, Mitchell v. Smith*, reported in 10 L. T. N. S., says: "In *Duffield v. Elwes* Lord Eldon, who was consulted by Sir John Leach when the case was before him, said he thought there could not be a *donatio mortis causá* of a mortgage. Sir John Leach then decided the case con-

trary to his own opinion, and Lord Eldon was a little out of humour about it and criticised the report." In *Veal v. Veal* (27 Beavan, 303) Lord Romily, as Master of the Rolls, on the authority of *Rankin v. Weguelin*, which had not before that been reported, decided to the same effect.

In *Moore v. Darton* (4 DeG. & Sm. 517) Knight Bruce, then Vice-Chancellor, held that when a receipt had been given by the borrower to the lender, as follows, "Received of D. £500, to bear interest at four per cent," that a delivery of this receipt to an agent of the borrower by the lender, on his death-bed, stating that he wished the debt to be cancelled, was a sufficient *donatio causâ mortis*.

Under the previous decisions it had been held that as a bond or mortgage afforded evidence of the debt, and the delivering of them to the donee vested the property in the paper, on which the bond and mortgage were written, in the donee, the executor of the donor could not recover it back again, and being intended to pass the debt, a Court of Equity would compel the executor to recover it for the benefit of the donee, or to permit him to do so in the name of the donor's legal representative.

Knight Bruce, in *Moore v. Darton*, justified his decision, on the ground that, although the donor when living might have sued the donee for the money loaned, without producing the receipt, yet, as he could not have recovered the interest except under the agreement to pay it, contained in the receipt, therefore the receipt was essential to the proof of the contract of the loan as it actually took place, and consequently the gift was effective to the person to whose agent it was delivered.

Witt v. Amis (1 Best & Smith, 109) decided that when a policy of insurance upon the life of the donor was delivered to the defendant by the intestate, together with a deposit note for £400, whereby a bank acknowledged to hold that sum as moneys of the intestate, that the policy might be the subject of a *donatio causâ mortis*.

It was contended that, as there was no regular assignment of the policy, the interest in it did not pass by mere

delivery. The Court, after taking time to consider, thought there was no distinction between a bond or mortgage and a policy of life insurance, as regards its capability of being made the subject of a *donatio mortis causá*, and decided in favour of the defendant. The same matter was brought before Lord Romily, as Master of the Rolls, in 33 Beaven, 620, and he held that both the policy of assurance and the deposit receipt were good donations *mortis causá*.

It seems to me these authorities are conclusive, as far as we are concerned, that the instrument granted by Mrs. McCabe would, if delivered properly as a good *donatio causá mortis*, give the right to defendants to receive the money mentioned in it, if Mrs. McCabe could so pass the the money.

As to proceedings to recover gifts of this sort, Lord Kingsdown, in giving judgment in *Cosnahan v. Grice* (15 Moore, P. C. Cases, 215) makes some very strong and convincing observations as to the propriety of throwing the burthen of proof on the donee, and expresses the opinion that no claim of that description ought to prevail, unless supported by evidence of the clearest and most unequivocal character.

As this case went to the jury, it appears to me that their finding can be of little consequence in settling the rights of the parties. The jury were only asked to say whether the endorsement on the deposit receipt was signed by Mrs. McCabe, or by her instructions for her, during her lifetime, and the jury found that the endorsement on the deposit receipt was signed by her.

I have gone over the case assuming that Mrs. McCabe had a legal right to dispose of the money, and perhaps, from the way the feigned issue is drawn up, such may be the proper way to consider it; but it appears to me that the order of my brother Adam Wilson directing the issue goes further, and the real object of the issue is to ascertain if the defendants have the right to the money. They claim it, and they ought to sustain that claim. It would be no justification to the Bank of Montreal to pay the money

over to these defendants, if the plaintiff in his individual, and not his representative character, is entitled to it, and the real object of the issue, I presume, was to test if the Bank was bound to pay over the money to these defendants, and could do so in safety against any right the plaintiff could set up.

In any view we take of this case there must be a new trial, for the matter has not been submitted to the jury with a view of having such facts found by them as will enable the parties to have their rights disposed of either in this Court or the Court of Appeals, or by the Judge who ordered the issue.

The jury should be asked to find expressly whether this was a gift *inter vivos* or in *mortis causâ*, and then, on their finding, the law may be settled by this Court, as far as we can do it.

If a new trial is had, the issue should be framed so as to raise the question whether plaintiff's wife, as a married woman, had any right to transfer this money at all; and in view of disposing of that question, it ought to be shewn when she and the plaintiff were married, whether there was any marriage settlement or not, and how this money was obtained by Mrs. McCabe.

It is by no means clear that there was evidence of a sufficient delivery at the trial to constitute a good *donatio mortis causâ*. This question was not argued before us: it was rather assumed it was not a good *donatio mortis causâ*. In the event of a new trial it will be necessary for the party claiming the gift to shew by evidence that there was such a delivery as, under the authorities, will sustain it. The cases to which we have referred, and which are noticed in the notes to *Ward v. Turner* (1 White & Tudor's Leading Cases in Equity), and *Williams on Executors*, last edition, chapter "*Donatio Mortis Causâ*," will shew the parties all that we have been able to discover, in the way of authority, as to what is necessary to be proven to make out a sufficient delivery to pass the right to a money claim as *donatio mortis causâ*.

We think there should be a new trial, costs to abide the event.

Rule absolute for new trial, costs to abide the event.

DAVIS V. STEWART ET AL.

Libel—Justification—Reversal of conviction before the alleged imprisonment—Pleading.

The declaration was for libelling the plaintiff, in the defendant's newspaper, in the following words, "Old S., who was naturalized by serving a term in the penitentiary of New York State," charging the meaning to be, that the plaintiff had served a term, as a convict, in said prison. The defendants pleaded, in justification, by setting up a conviction of the plaintiff of an indictable offence before the Recorder's Court in Buffalo, prior to the publication of the libel, his sentence and condemnation to imprisonment in the State prison of New York State for the term of two years, and his subsequent committal to that prison and detention there for that period.

Replication, that within three months from the time of the alleged conviction, and before the plaintiff was imprisoned for the said term in said State prison, the conviction was reversed by the Supreme Court of the State of New York, and the plaintiff released from custody upon the charge against him.

Held, on demurrer, replication good.

THE declaration was against defendants, as proprietors of a newspaper, called "The Hamilton Evening Times," for a libel published therein against plaintiff, in his business of hotel-keeper, and vendor of fancy goods, photographs and views of Niagara Falls, at his place of business, called "The Table Rock House," at Niagara Falls. The article complained of in effect charged plaintiff and his family with being a set of robbers and swindlers, and warned the public against their impositions and extortions, referring especially to plaintiff as "Old Sol, who was naturalized by serving a term in the penitentiary of New York State," meaning that plaintiff had served a term, as a convict, in said prison.

Defendants pleaded, justifying the libel in question, by charging that plaintiff had been tried and convicted,

anterior to the publication of the libel, before the Recorder's Court at Buffalo, in the State of New York, of obtaining money under false pretences, and had been sentenced and condemned to imprisonment in the State prison of New York State for the term of two years, and that in pursuance of such sentence and condemnation he had been committed to and detained in said prison for the said term.

Replication, that the alleged conviction in the plea mentioned was obtained and procured without any legal or sufficient evidence of the committing of the alleged offence, and against natural justice, and was erroneous in law; and that afterwards the plaintiff duly appealed against said pretended conviction to the Supreme Court of the State of New York, having appellate jurisdiction in the premises, and such proceedings were thereupon had that the said pretended conviction was by the said Supreme Court thereupon and within three months from the time of such alleged conviction, and before the plaintiff was imprisoned for said term in said State prison, and before the publication of the alleged libel, reversed and annulled for the reasons aforesaid, and the plaintiff declared not guilty of and released from custody upon such false and pretended charge.

Demurrer, that the reversal of the conviction was no answer to the defendant's plea, as the imprisonment was admitted, and the alleged libel, which only charged that the plaintiff had been imprisoned, was thus admitted to be true.

C. S. Patterson, for the demurrer, cited *England v. Burke*, 3 Es. 80; *Helsham v. Blackwood*, 11 C. B. 111; *Cuddington v. Wilkins*, Hob. 81.

R. A. Harrison, Q. C., contra.

RICHARDS, C. J., delivered the judgment of the Court.

I think the defendants' demurrer to plaintiff's replication is bad. The part of the libel stated in the first count of

the declaration attempted to be justified in the plea is that which states that "Old Sol, who was naturalized by serving a *term* in the penitentiary of New York State," (meaning the plaintiff had served a term as a convict in said prison).

The defendants justify the charge by setting up a conviction of the plaintiff of an indictable offence before the Recorder's Court of Buffalo, anterior to the publication of the libel, and that he was thereupon sentenced by the judgment of the Court and condemned to be imprisoned in the State prison at Auburn, in the State of New York, for the *term* of two years, at hard labour, and he was afterwards committed and lodged in the said prison, and kept and detained, in pursuance of the said judgment, for a long space of time, to wit, for the period of two years.

Thus far, it seems to me, the pleader who drew the plea of justification, assumed that the words "served a term," mentioned in the libel, meant *the term of imprisonment* to which he was sentenced, as a convict; for he refers to the proceedings of the Court, under which plaintiff was condemned to be imprisoned "for the *term* of two years at hard labour," and the concluding part of the plea is, that he was kept and detained in the prison, in pursuance of the said judgment, for, to wit, the period of two years. It seems to me the pleader has fixed his own meaning on the words *serving a term* in the penitentiary, and that meaning is the *term* of imprisonment to which he was sentenced. The replication displaces that part of the plea, and assumes the view taken by the plea to be correct, and shews that the plaintiff did not serve the term of the imprisonment to which he was sentenced, but was released from doing so by the reversal of the judgment under which he was imprisoned.

The charge that he was convicted and imprisoned in the penitentiary may be made out under the plea, and is not denied in the replication, but the charge that he served the term which he was condemned to serve under the conviction is not admitted, but expressly denied. The portion

of the libel contained in the second count of the declaration, and justified under the plea, is so connected with the other, that, as far as the view we take of the plea is concerned, it need not be considered apart from the other.

If it is argued that the serving out the whole term of the imprisonment, to which he was condemned, is not a matter that can properly be deemed libellous, when it is substantially admitted that he was convicted of the offence and sentenced to the imprisonment, and did serve, under such conviction and sentence, a portion of the term, the answer seems to be that there may be degrees of depravity in crime and degrees of turpitude attached to the periods of imprisonment, and when a man is charged with serving the *term* of imprisonment, and he did not so serve, it implies that he did not shew facts to modify his crime, so as to obtain a pardon or reverse the sentence to obtain his liberty.

The case of *Helsham v. Blackwood* (11 C. B. 111) is a strong case against the defendant. There an account was published in defendant's magazine of plaintiff's trial for murder before Sir John Bayley, for killing Lieut. Crowther in a duel. The account of the duel in the magazine stated it was understood that the counsel for the prosecution was in possession of a damning piece of evidence, viz., that the plaintiff had spent nearly the whole of the night immediately preceding the duel in practising pistol-firing. The defendant justified, and set out the whole of the proceedings at the trial, and alleged that the plaintiff did feloniously, wilfully, and of his malice aforethought, kill and murder the said Joseph Crowther in the said duel; but did not justify the reference to the practising with the pistol the night before the duel.

The replication endeavoured to set up plaintiff's acquittal on the trial, by way of estoppel to the matter set up in the plea, and on this exception was taken to the plea, that it did not answer the gist of the whole of the libellous matter. On the argument it was contended there were no degrees of murder, and if the plaintiff was guilty it did not matter whether the means he took to qualify himself to

commit the crime was practising pistol-firing the night before the duel or not.

The Court held the plea bad; for the libel charged the plaintiff with committing murder under circumstances of grave and malignant aggravation, and the justification simply stated that the plaintiff committed murder by killing his antagonist in a duel. The words used by defendant, calling it a damning piece of evidence, shewed that defendants intended to impute something more culpable than murder under the circumstances which usually attend a hostile meeting.

Maule, J., said: "When an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff."

Can there be any doubt it is injurious to a plaintiff to say that he served the term of imprisonment to which he was condemned for the crime of which he was convicted, when in truth he did not serve such term, but was discharged from such imprisonment during the term, because the conviction was declared to be illegal?

In *O'Brien v. Clement* (16 M. & W. 159) the defendant published of plaintiff that he was a confederate of black-legs; that he had sought admission into a yacht club; that he gave an entertainment in the expectation of being elected, but was black-balled, and the next morning *bolted*, and some of the tradesmen of the town had to lament the fashionable character of his entertainment. A plea of justification, after alleging facts to shew that the plaintiff was the confederate of persons who had been guilty of cheating at cards, and the facts of his giving an entertainment, and of his being black-balled, as mentioned in the libel, stated on the following morning he quitted the town and neighbourhood, leaving divers of the tradesmen, to whom he owed money, unpaid, naming them. The plea was held bad. The plea was held bad, as the Court considered the word "bolting" to impute a fraudulent evasion of his creditors,

he being unable to pay them, and that he went away suddenly from Plymouth, leaving debts unpaid, and under such circumstances that the creditors could not find him, and therefore meant more than the mere "quitting" which was stated in the plea: that would be an innocent departure, and consistent with proof that plaintiff went out of town for a day, but returned and paid his debts.

On the whole, there must be judgment for plaintiff on the demurrer, on the exception taken to the replication, viz., that it is no answer to the defendants' plea, as the imprisonment is admitted, and the alleged libel, which only charged that the plaintiff had been imprisoned, is thus admitted to be true. We think the libel charged more than the mere imprisonment: it charged imprisonment for the term for which he was sentenced to be imprisoned.

Whether the taking of issue on the plea would not have compelled the defendant to have proved the imprisonment for the whole term, and therefore the replication was unnecessary, was not raised in argument, or by the exceptions to the replication.

Judgment for plaintiff on demurrer.

MCHUGH V. GREAR.

Seduction—Agreement to support child—Pleading.

Declaration in seduction, by the father.

Plea, in effect, that after the seduction it was agreed between plaintiff and defendant that if defendant would agree to take, maintain, and support the child at his own costs, &c., from the date of such agreement, plaintiff would accept the same in full satisfaction and discharge; and that defendant, in pursuance thereof, did agree so to do, and plaintiff accepted said agreement in full satisfaction, &c.

Replication, that before said agreement was made the mother of the child made the usual statutory affidavit, and filed it within the required time, and before the alleged accord, in the office of the Clerk of the Peace, and that defendant, before and at the time of the making of such alleged agreement and accord, was liable in law to maintain and support the child.

Held, on demurrer, plea good, as setting out an agreement on defendant's part, for which a sufficient consideration appeared in his undertaking a liability which he was not bound to assume, and that defendant was not obliged to shew that he had actually performed his agreement, as this was unnecessary to support the accord set up by the plea.

Held, also, that the replication was bad, and did not displace the plea.

DECLARATION, for seducing plaintiff's daughter, &c.

Plea (second), that before action it was agreed between plaintiff and defendant that if the defendant would agree to take, maintain, and support the child in said declaration mentioned at his own costs, charges and expenses, from and after the date of such agreement, plaintiff would accept such agreement in full satisfaction and discharge of the grievances in the said declaration mentioned: averment, that in pursuance of said agreement, defendant, on the date of such agreement, agreed to take, maintain and support the said child, from and after the date of such agreement, at his own costs, charges and expenses, and plaintiff then accepted the said agreement in full satisfaction and discharge as aforesaid.

Replication, that before the making of the alleged agreement and accord in said plea mentioned, and while said Elizabeth McHugh, mother of said child, was pregnant with said child, she voluntarily made the prescribed statutory affidavit, before a Justice of the Peace, declaring defendant to be father of said child, and deposited such

affidavit within the time required by the Statute, and before the making of said alleged accord, with the Clerk of the Peace; and defendant, before and at the time, and before the making of such alleged agreement and accord, was liable in law to maintain and support said child.

Demurrer to plea—1. No consideration for the alleged agreement in said plea set out, and no good accord and satisfaction in law.

2. Not shewn that any benefit was or could be derived by plaintiff from said alleged agreement, nor that it was made at plaintiff's request.

3. That defendant's alleged agreement was not a good consideration for discharge of a cause of action, as it was only for what he was already liable in law, if an affidavit were filed by the seduced female according to the Statute; and, if no such affidavit were filed, then defendant's promise not binding nor enforceable.

4. Not alleged in said plea that defendant actually took or maintained said child, in pursuance of said alleged agreement.

Demurrer to replication—1. Not shewn by whom affidavit made or sworn.

2. Not stated that defendant was liable in law to plaintiff to maintain and support said child.

3. That defendant by said agreement and accord incurred a liability in excess of and beyond that imposed upon him by law.

4. Replication no answer to plea, inasmuch as defendant not bound by law to take said child, as agreed to by him.

5. Not averred that defendant would have continued to be liable for support of child after making of agreement and accord, even if no such agreement and accord had been made.

6. That Statute imposed no liability upon defendant to pay for maintenance of child of a seduced female, excepting to the person actually furnishing such maintenance to such child, and the law imposed no liability upon plaintiff to furnish such maintenance and support to such child.

7. That defendant, by admitting himself to be father of child of seduced female, imposed upon himself a liability which he was under no obligation to incur.

R. A. Harrison, Q.C., for the plaintiff, cited *C. S. U. C. ch. 77*; *Smith v. Roche*, 6 C. B. N. S. 223; *Miller v. Whitenbary*, 1 Camp. 428; *Mortimore v. Wright*, 6 M. & W. 482; *Eastwood v. Kenyon*, 11 A. & E. 438; *Jennings v. Brown*, 9 M. & W. 496; *Linnegar v. Hood*, 5 C. B. 437; *Hicks v. Gregory*, 8 C. B. 378; *Crowhurst v. Laverack*, 8 Ex. 208; *Harris v. Watson*, Peake, 102; *Bridge v. Cage*, Cro. Jac. 103; *Collins v. Godefroy*, 1 B. & Ad. 950; *Shadwell v. Shadwell*, 9 C. B. N. S. 159, & 178, per Byles, J.

Beynon, for defendant, cited *Slater v. Smith*, 10 U.C. 630.

RICHARDS, C. J., delivered the judgment of the Court.

The case of *Mortimore v. Wright* (6 M. & W. 482), followed by other cases subsequent thereto, fully establishes the doctrine that a father at common law is not even bound to support his legitimate children, much less those of whom he is only the putative father.

The only liability of a legal character cast on this defendant to support the child, of which plaintiff's daughter was delivered, is that created by our Provincial Statute, found in Consol. Stat. U. C. ch. 77. This Statute, after giving the right to the father, or, in the event of his death, to the mother, of an unmarried female, to bring an action for her seduction, under certain circumstances, though at the time of her seduction she was living or residing with another person, (and on trial of the cause proof of service was dispensed with), by sec. 4 enacts, that any person, who furnishes food clothing, lodging, or other necessities, to any child born not in lawful wedlock, may maintain an action for the value thereof against the father of any such child, if the child was a minor at the time the necessities were furnished, and was not then residing with his or her reputed father or mother, and maintained by him as a member of his family.

Sec. 5: "If the person suing be the mother of the child, or a person to whom the mother has become accountable for such necessities, the fact of the defendant being the father of such child shall be proved by other testimony than that of the mother."

Sec. 6 then directs that no action shall be sustained under the 4th or 5th sections, unless it is shewn on the trial that the mother, whilst pregnant, or within six months after the birth of the child, made an affidavit in writing, before a Justice of the Peace for the County, or City, within which she resided, declaring that the person, who might afterwards be charged in such action, was really the father of such child, nor unless she deposited such affidavit within the said time in the office of the Clerk of the Peace, or Clerk of the Council of the City, as the case might be.

Looking at the declaration in this cause as merely shewing the seduction of plaintiff's daughter by the defendant, it appears to me the defendant's second plea sets up an agreement, which, on its face, shews a good consideration moving from him, namely, an undertaking to take, maintain, and support the illegitimate child of plaintiff's daughter. There are no facts presented in the declaration to shew that defendant was in any way legally bound to support the child, or pay for its food, clothing, lodging or other necessities. On the face of the pleadings, up to this point, there seems to be a sufficient consideration, by the undertaking of defendant to incur a liability which in law he was not bound to incur, for the release of the liability incurred by him in the seduction of plaintiff's daughter.

The only point noted for argument to shew the plea bad, in the view I take of it, which requires much consideration, is that which is mentioned in the fourth ground of objection, viz., that it is not alleged that the defendant actually took or maintained the child in pursuance of the agreement.

The first objection is that it shews no consideration. That, I think, has already been answered.

2. No benefit derived by plaintiff from the agreement. That is not necessary. If the defendant undertook to do anything he was not bound to do, which was a burden to him, that would be sufficient consideration: the undertaking to take and support the child is incurring a liability, which is a sufficient consideration.

3. There is nothing in the declaration or the second plea to shew that there was any obligation in law cast on defendant to support the child.

As to the 4th objection, there was nothing said in support of it in argument, and I do not see that the performance of the agreement is necessary to support the accord set up by the plea. What is alleged, as I understand it, is that the plaintiff agreed to accept this agreement, to take and support the child, in satisfaction of his claim against the defendant for damage for seducing his daughter.

Then, as to the mere matter set up in the replication. It only shews that the defendant might, under certain circumstances, be liable to any person who should furnish food, clothing, lodging or other necessities to the child, and I have no doubt this contingent liability, connected with the moral obligation so to do, would be a good consideration for any promise that defendant might make to any one who would agree to furnish food, clothing, &c., to the child for him. But the undertaking of this defendant is to do more than furnish food, clothing, lodging or other necessities for the child: it is *to take, maintain and support* the child; quite a different obligation from paying for food, clothing, lodging and other necessities. In the one case the mother may have the care, custody, responsibility of looking after the child, and she would not be able to recover herself, nor any one to whom she became responsible, for the food, &c., furnished the child, except by the proof, of defendant being father of the child, required by the Statute. But if the defendant took, maintained and supported the child, he would be bound to do it himself individually, or, as a primary liability, pay those who did it for him, with-

out any evidence as to the paternity of the child. On the whole, I think the defendant's plea good, and not in any way displaced by defendant's replication.

Judgment for defendant on both demurrers.

IN RE BURROWES.

Division Court—Prohibition—Estoppel—Entitling of affidavits—Adjournment by Division Court Judge of hearing of cause to Chambers—Reading of written judgment by Clerk—Examination of parties under oath.

In an application for a prohibition against the Judge of a Division Court, for an alleged acting without jurisdiction in a cause before him in that Court, the affidavits upon which the rule *nisi* was granted were entitled, "In the matter of a certain cause in the First Division Court of the Counties of L. & A., in which E. A. M. is plaintiff, and B. D. is defendant:" *Held*, following *Hargreaves v. Hayes*, 5 E. & B. 272, that the entitling of the affidavits in this way was unobjectionable.

A Judge of the Division Court may, under the 86th section of the Division Court Act, *adjourn the hearing of a cause* from a regular sitting of the Court to his Chambers within the territorial limits of the division, and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, *an adjournment of the Court to hear that cause*.

Where a Judge of the Division Court, at the close of the hearing of a cause before him, announced that he would take time to consider, and deliver judgment at his Chambers on a subsequent day, without naming an hour, and before that day sent a written judgment to the Clerk of the Court, who read it in his office to the agents of both parties on that day:

Held, a sufficient delivery of a written judgment within section 106 of the Division Court Act.

A Judge of the Division Court may, under section 102 of the Division Court Act, examine under oath plaintiff or defendant in any cause before him in that Court, although the demand exceed eight dollars.

Held, also, that an applicant for a prohibition against a Judge of the Division Court for excess of jurisdiction, who has appeared at the trial, cross-examined witnesses, argued the case before the Judge, and taken no exception, at the time, to the jurisdiction, is precluded by his own act from objecting to the jurisdiction after judgment entered and execution issued in the Court below.

Diamond obtained a rule *nisi* calling on J. J. Burrowes, Esq., Judge of the County Court of the County of Lennox and Addington, and Ezra A. Mallory, plaintiff in a certain cause in the First Division Court of the said County against

Barnabas Diamond, to shew cause why a writ of prohibition should not issue directed to the said Judge and the said Ezra A. Mallory, prohibiting any further steps being taken for the enforcement of the judgment pronounced in the said cause, or the execution issued thereon, on the following grounds :

1. That the Judge exceeded his jurisdiction in hearing and determining the said cause, by adjourning the same from open Court to his Chambers to a subsequent day, and, before that day arrived, making a further adjournment to another day, on which latter day he heard evidence in the cause at his Chambers, which he had no power to do.

2. That the Judge exceeded his jurisdiction in pronouncing and delivering his judgment out of open Court, at the Clerk's office, without having first in open Court fixed a day and hour for pronouncing and delivering such judgment.

3. That the said Judge called plaintiff as a witness in his own behalf in said cause, wherein the claim or demand exceeded eight dollars.

4. That the written judgment so delivered did not fix any day on which defendant was ordered to pay the amount thereof, and was otherwise irregular, illegal, and incapable of being enforced.

5. That said judgment was never duly pronounced and delivered, and the said Judge was *functus officio* when he did pronounce and deliver the same.

6. And on grounds disclosed in affidavits and papers filed.

The facts appearing from the affidavits filed were to the following effect: A summons was issued in the suit on 22nd February last, out of the First Division Court of the County of Lennox and Addington, in favour of Ezra A. Mallory against Barnabas Diamond, commanding the latter to appear at the sittings of the said Court, to be holden at the Town Hall, Napanee, on Saturday, the 21st March, 1868. On the return of the summons the defendant

appeared and the cause was called on for hearing on that day, when several witnesses were examined on behalf of the plaintiff, and the case, together with the Court, was adjourned to the next Monday, the 23rd of March. On Monday, the 23rd, defendant attended when other witnesses were examined, and the Judge again adjourned the cause until the Friday following, viz., the 27th of March, to be heard at the Judge's Chambers in the Court House, in Napanee, and not in the Town Hall. The object of that adjournment was to obtain the attendance of the said Mallory, whom the County Court Judge wished to examine. Mallory had been subpoenaed to attend the sittings of the Court of Oyer and Terminer at Kingston, and could not be present on the day mentioned, the 27th of March, on which the Judge, on or about the 25th of March, directed the hearing of the case to be further postponed to the 3rd of April, at his Chambers in the Court House, and notice was given of the time and place to defendant's agent, who informed the defendant thereof.

On Friday, the 3rd of April, Mallory, with his counsel, and Diamond, with his counsel, attended before the Judge at his Chambers, and the Judge called Mallory as a witness, and swore and examined him, and he was cross-examined on behalf of Diamond. After Mallory had been sworn, the Judge asked Diamond if he would be sworn in the cause, but he declined, saying that Mallory had stated the matters of the suit correctly. After Mallory had been sworn, Diamond's counsel argued the case for him, and Mallory's agent argued on the other side. The Judge said he wished to consult the authorities referred to, and proposed that he should give a written judgment on Tuesday, 7th April, to which both agents and parties assented.

The Judge made up his judgment, and enclosed it in a sealed envelope, with the papers, to the Clerk of the Court, in the usual way, before 7th April, and the judgment was exhibited by the Clerk to the parties and their agents on that day. The Judge had endorsed on

the summons, before it was sent to the Clerk, "Judgment for the plaintiff for ninety-nine dollars and three cents and costs, to be paid on the 18th day of April, 1868. Tax as many witnesses as are sworn to in affidavit of disbursements.

J. J. BURROWES."

There was also a written judgment, giving the grounds of his decision *in extenso*, a copy of which was filed on this application.

One of the parties, who acted as agent for Diamond, stated in his affidavit that on the 23rd of March the Judge expressed his intention to adjourn the cause to his Chambers, and then and there adjourn the *further hearing* of said cause to his Chambers on Friday, 27th March, but the Court was not then adjourned by the said Judge, and other causes were afterwards on the same day, immediately thereafter, called on and disposed of by the Judge in Court.

K. Mackenzie, Q. C., shewed cause :—

The affidavits on which the rule was moved are wrongly entitled. They can only properly be entitled in this Court, and, if the reference to the case in the Division Court be rejected as surplusage, the affidavits will then be defective in not satisfactorily shewing the proceedings in the case in the Court below.

The affidavits ought to shew that an action was instituted, or that defendant was summoned, or that a summons was issued, stating the Court out of which it issued. See form in *Lloyd's County Court Practice*, 241; *Archbold*, Pr. 1545; *Ex parte John Nohro*, 1 B. & C. 267; *Ex parte Evans*, 2 Dow. N. S. 410; *Reg. v. Harland*, 8 Dow. 323; *Ex parte Wallwork*, 4 D. & L. 403; *Lloyd's County Court Practice*, 218, 219, 221.

Any irregularity in the proceedings was waived by defendant's attendance at the adjournment of the case, cross-examining the witnesses, arguing the case before the Judge, and assenting to his taking time to decide the case.

If they disputed the jurisdiction of the Judge, they should have so stated at the time: the usual form of the affidavit to move for prohibition in England states they excepted to the jurisdiction.

They acquiesced in the judgment and did not even move for a new trial, which they might have done; for it is shewn by the affidavits that the defendant's agent was present on the day the written judgment was to be delivered, and the clerk allowed him on that day to take a copy of it at his office.

The execution having issued in April, and no application having been made either for a new trial or for the prohibition until this time, they are too late.

The following are the sections of the Consol. Stat., U. C., ch. 19, "The Division Court Act," which should be referred to: sections 86, 102, 106, 191.

J. A. Boyd, contra:—

There is something to prohibit, and as long as that is the case it is not too late to move: *Thompson v. Ingham*, 14 Q. B. 710: *Marsden v. Wardle*, 3 E. & B. 695.

This being an Inferior Court, it is necessary that any proceeding should be in accordance with the Statute, and that the Judge should in no case exceed his authority: *Brymer v. Atkins*, 1 Hy. Bl. 187: *Gare v. Gapper*, 3 East 475; *Gould v. Gapper*, 5 East 364.

There is no power in the Judge to hear a case except before the Court. Any witnesses sworn before him under those circumstances could not be indicted for perjury: *Lavey v. The Queen*, 2 Den. C. C. 504.

Under section 6 of the Division Court Act a Court is to be held in each division once in two months, and oftener, in the discretion of the Judge, who may appoint and from time to time alter the times and places when and at which the Court shall be holden.

Section 20 provides for adjourning the Court from day to day by the Clerk, if the Judge does not arrive to open the Court in time on the day appointed for that purpose.

Section 44 provides for certain lists being put up in

some conspicuous part of the Court House or place where the Court is held.

By section 84, on the day named in the summons, the defendant in person, or by some one in his behalf, shall appear in Court.

Section 97 authorizes the issue of a subpoena compelling the witnesses to attend at a specified Court or place. Section 100 also refers to subpoenas. Section 106 has already been cited. Section 132 authorizes the Judge to call a jury of five of the persons present. If Court held at the Judge's Chambers, there would not be likely to be five present for jurors.

Section 133 allows the jury to be discharged, and the cause adjourned until the next Court.

These sections all shew that the proceedings are to take place in open Court, and not in the Judge's Chambers. Section 162 speaks of the examination of judgment debtors being in the Judge's Chambers, unless he shall otherwise direct.

Sections 182 and 183 speak of persons wilfully insulting the Judge, or any officer of any Division Court, during his sitting or attendance in Court, or interrupting the proceedings of the Court, being taken into custody and fined, and sent to prison in default of payment.

Under section 183 every bailiff is to exercise the authority of a constable during the actual holding of the Court, with power to prevent breaches of the peace within the Court Room or building in which the Court is held, or in the streets, squares and other places within hearing of the Court.

These sections would not apply when the Judge was hearing a case in his Chambers: that would not be holding a Court. If he attempted to fine and commit for contempt, he would probably not be justified in doing so: *Wadsworth v. Mewburn*, 6 O. S. 432.

The second adjournment of the case took place when no one was present on behalf of the defendant in the Division Court suit.

Where a Judge after deciding one way, when defendant was present, gave defendant notice of an adjournment to the following day, defendant attended and protested against his right to change his decision, and the Judge altered it, the Court granted a prohibition, saying he had no jurisdiction, after deciding the matter, to change his decision, in the absence of the defendant, after the Court was over for that day, in his own Chambers. *Jones v. Jones et al.*, 5 D. & L. 628, establishes that.

Humphries v. Longmore, 6 C. B. 363, shews that where the inferior Court exceeds its jurisdiction, the proceedings are void.

Fearon et al. v. Norvall, 5 D. & L. 445, 450, is to the effect that proceedings in an inferior Court, when not warranted by Statute, are to be treated as of no effect. In that case the County Court, on the 21st July, ordered the defendant to give up possession of certain premises on 24th December: under the Statute and Statutory Rules the Court ought to have ordered possession to be given up *forthwith*: it was held such proceeding, not being authorized, was a nullity, and the party might begin proceedings *de novo* to obtain possession.

Smith v. Rooney, 12 U. C. 661, is an express authority that rules granted on motions made in vacation, on an understanding between the legal practitioners in a County and the County Judge, that motions for new trials in the County Court might be made in vacation, cannot be enforced, and a judgment, which had been entered before a new trial had been moved for, and after the time allowed by law to move for new trials had elapsed, was sustained, though the County Judge had set it aside and allowed a new trial in vacation.

In *Ryan v. May*, 11 L. T. N. S. 718, where defendant attended before the Sheriff on a writ of trial, and a verdict was had against him, he was allowed to move to set aside the verdict, because the claim was not a mere money demand, and the Sheriff had no jurisdiction to try it. The Court, however, would not allow any costs.

RICHARDS, C. J., delivered the judgment of the Court.

The general rule seems to be, that when there is no cause in Court affidavits should be entitled in the Court only, and not in any cause, but after a writ has issued they may be entitled in the cause. In *Ex parte Evans* (2 Dowl. N. S.) the affidavit, on which the rule for prohibition was granted, was headed, "In the Queen's Bench," and purported to be "in prohibition," and to be sworn in a cause "Between the Reverend Thomas Bevan Gwyn, clerk, party agent, and Mary Evans, a single woman, respondent." It was urged there was no such cause in Court, and on such affidavits perjury could not be assigned. In reply it was contended the affidavits were not entitled in any cause in the Court of Queen's Bench, but in the Ecclesiastical Court, and that part which related to the Ecclesiastical Court might be rejected as surplusage, or only descriptive of the parties who were to be brought into the superior Court. The rule was discharged, the Judge (Wightman) thinking the objection fatal.

In *Breedon v. Capp* (9 Jur. 731, Bail Court, 1st May, 1845), in shewing cause to a rule for a prohibition to restrain certain proceedings in the Southwark Court of Requests, the affidavits were entitled "In the Queen's Bench. Between Mary Ann Breedon, plaintiff, and William Capp, defendant, in prohibition." It was contended this was wrong, as there was no cause in Court, that they should have been entitled, "In the Queen's Bench" only. *Ex parte Evans* was referred to. Coleridge, J., after consulting the Master, said, "I think you are entitled to read the affidavits. The Master tells me that in cases of award the affidavits are always entitled in the cause after the rule *nisi*."

In *Paterson's Practice*, 1209, in relation to prohibitions, it is stated, "The necessary facts useful for the application should be set forth in an affidavit entitled in the Court, *but not in any cause*."

In *Lloyd's County Court Practice*, 240, it is laid down, "The affidavit on which the motion is made must be

entitled in the Court where the rule is moved for; but it ought not to be entitled in any matter, as there is no cause in Court."

In *Pollock and Nicol's County Court Practice*, in reference to affidavits on which to move a prohibition, "They must be entitled simply in the Court, and not in the name of the cause, as there is at that time no such cause in Court."

Chitty's Archbold, 12th ed. 1737: "The affidavit on which the rule *nisi* is moved for, should be entitled in the Court to which the application is made, but not in any cause or matter."

These works on Practice are all published since the decision of *Hargreaves v. Hayes*.

In *Hargreaves v. Hayes* (5 E. & B. 272) the affidavit to hold the defendant to bail was entitled, "In the Queen's Bench. Between James Henry Hargreaves, plaintiff, and Edward Hayes, defendant." The order to arrest was obtained on the 18th of May, on the affidavit sworn to on the 17th of May, and the summons in the cause was taken out on the 18th of May. It was objected that when the affidavit was sworn no cause existed, the writ not having been taken out. Coleridge, J.: "The Court is shewn; is not that enough?" Lord Campbell: "The names are surplusage, and can do no harm: could not perjury be assigned on this affidavit?" Coleridge, J.: "That objection might possibly be good if the cause were named and not the Court." In the further argument counsel stated there were many authorities on this point in cases of awards. Crompton, J.: "And in cases of criminal information." Counsel added, "And in cases of information in the nature of *quo warranto*." Lord Campbell: "I do not see that it is necessary to treat the mention of names here otherwise than as *demonstratio personæ*." In giving judgment Lord Campbell said: "The placing of the name of the plaintiff and defendant at the head of the affidavit cannot vitiate: it gives information, and can by no possibility do harm. I have no doubt that the party swearing might be indicted for perjury

on this affidavit; and there is no inconvenience in this view. If, indeed, there had been a cause in Court, and the affidavit had omitted to name it, that would be bad, because no perjury could then be assigned on the affidavit; but where there is no cause the names are still mere surplusage; and you have here the name of the Court." Coleridge, J., concurred with Lord Campbell on this point. Erle, J., referred to *Schletter v. Cohen*, where it was held the affidavit might be sworn contingently, with a view to a cause in which the writ was to issue, and said there was great convenience in that practice. Crompton, J., said, that if there was yet no authority to shew that putting the names of the plaintiff and defendant at the head of the affidavit did not vitiate the affidavit, there should be such authority.

Here the affidavits are entitled, "In the Common Pleas. In the matter of a certain cause in the First Division Court for the County of Lennox and Addington, in which one Ezra A. Mallory is plaintiff, and one Barnabas Diamond is defendant."

After the decision of the Court of Queen's Bench, in *Hargreaves v. Hayes*, I think we cannot properly hold that the affidavits filed on moving the rule should be rejected. The decided opinion expressed by the majority of the Judges in that case, that the words there objected to would not prevent the affidavits being used as the foundation for an indictment for perjury, will apply in this case.

Some of the older cases say that the Court will not nicely weigh and discuss the question whether perjury will lie on an affidavit or not. If a party departs from the well-known established forms and rules as to entitling affidavits, the Court will reject them. Though inclined to think this is the safest, and perhaps best rule to abide by, yet I am not, as already intimated, prepared to reject these affidavits.

Then, as to the main question, whether the County Court Judge has so far departed from the proper usage and practice in relation to the proceedings in the Divi-

sion Court that we must grant the prohibition now sought for, on the ground that his proceedings are entirely void.

No doubt, if he has acted beyond his jurisdiction, we must interpose. It is indisputable in this matter that Judge Burrowes had jurisdiction over the subject matter of the claim between the parties in the Court below; that at the time the proceedings were instituted and the decision given by him he was the County Judge of the County within which the proceedings took place, and the whole adjudication and proceedings took place within the Division of the Court named of which he was the Judge; so that territorially, and in relation to the subject matter of the suit, he had jurisdiction; and up to the time of the adjournment of the cause, on the 23rd of March, no objection can be taken to his proceedings. Let us see what took place then. On the 23rd of March he had heard all the witnesses that the parties were desirous of bringing before him. He called the plaintiff in the suit, who was not then present, whom he wished to examine under oath, and he then announced, in presence of the defendant, and his agent, who attended on his behalf, that he intended to adjourn the cause, and he did then and there "adjourn the further hearing of said cause to his Chambers, on Friday, the 27th day of March;" but the Court was not then adjourned. No objection was made at the time, or any dissent of any kind expressed to the proceeding. Defendant's agent thinks on the 25th of March he was notified by the plaintiff's agent that the Judge had further adjourned the hearing of the cause from the 27th of March to the 3rd of April, at the same place, and he advised defendant of this. The further adjournment was caused by Mallory being obliged to attend at the Kingston Assizes as a witness. On Thursday, the 3rd of April, they all attended at the Judge's Chambers in the Court House, plaintiff and his agent, defendant and his agents, for he had in the meantime obtained the assistance of another professional gentleman of considerable eminence, Mr. Jellett, of Belleville. Mr. Mallory was examined by the Judge, and cross-examined

by Mr. Jellett for the defendant. The Judge offered to swear the defendant, but he declined, saying Mr. Mallory's statement was correct. The agents and counsel for both parties then addressed the Judge.

The Judge stated he would consult the authorities, and give his judgment in writing on Tuesday, the 7th of April. To this no one objected.

The affidavits made by Mr. Diamond state that the Judge appointed Tuesday, the 7th of April, to deliver his judgment, but did not name any hour.

Mr. Preston, who acted as Diamond's agent, said the Judge appointed the following Tuesday, 7th April, to give his judgment in the said cause, in writing, at his Chambers aforesaid.

The first adjournment to the 27th of March, made in open Court, in the presence of the parties, is spoken of in the affidavits as adjourning the hearing of the cause to his Chambers. I presume he could have adjourned his Court to his Chambers. They were in the Court House, which was in the same village as the Town Hall where the Court was held, and I see no reason why he could not have adjourned the Court, if he thought proper, to his Chambers, it being within the Division. We can suppose the Town Hall struck with lightning, and rendered incapable of being used; unless the Judge could adjourn the Court, the business could not go on. I see no good reason why he might not adjourn the Court and hold it in his Chambers, if need be, nor why he might not adjourn the hearing of a particular case to his Chambers, if it suited the convenience of all parties, and they did not object to it.

The 86th section of the Statute refers to the Judge adjourning *the hearing of any cause* on such conditions as he may think fit, and for all practical purposes why may not that adjournment be held to constitute an adjournment of the Court as to that cause? The subsequent notice of a further adjournment to the 3rd of April being communicated to the parties, and virtually sanctioned by them by their attendance on that day, and without objec-

tion proceeding with the cause, seems to me to shew that all the parties interested considered *that* an adjournment of the Court for the purpose of going on with that cause, and they should not now be permitted to set up anything against that. If on the 3rd of April the defendant's counsel, whom he had probably brought there at considerable expense, had objected to the cause proceeding, because it had not been properly adjourned, the plaintiff could have discontinued his suit and brought another; but, when all parties viewed it as a proper adjournment at the time, they ought not to be allowed to allege anything to the contrary now.

As to *Smith v. Rooney* (12 U. C. Q. B. 661), to which reference has been made, under the Statute it is expressly declared that no motion for a new trial or non-suit in the County Court shall be entertained after the rising of the Court on the second day of the term, and a party obtaining a verdict may enter his judgment on the third day of the next ensuing term. No consent on the part of attorneys, or understanding with the Judge, could well be set up against this express provision of law, to justify setting aside a judgment entered according to the express terms of the Act of Parliament. But even in that case the learned Judge, now the Chief Justice of Upper Canada, who delivered the judgment of the Court, said: "The Court would not, unless perhaps under some extreme circumstances, listen to a party applying against proceedings taken in a cause by his own express consent, as, when a particular step was agreed on, or a particular objection was waived. But this is not a case of that description. The consent spoken of does not appear to be as to a particular step in a cause, or even to be limited to a particular cause, but is made with all legal practitioners with regard to the transaction of all their business."

In *Andrews v. Elliott* (5 E. & B. 502, same case in the Exchequer Chamber, 6 E. & B. 338) the facts were, that an issue stood for trial at the Summer Assizes for Surrey. It was proposed at *Nisi Prius*, before Wightman, J., that

the cause should be tried without a jury before Mr., now Baron, Bramwell, whose name as a Q. C. was in the commission of *Nisi Prius*. The learned Judge approved of this, and the case was tried before Mr. Bramwell, the attorneys for both parties attending, and the plaintiff himself being examined as a witness. The verdict passed for the defendant. There was no summons, nor any written consent for the trial.

The authority to try the issue was under the Common Law Procedure Act of 1854, sec. 1, which enacts that "The parties to any cause may, by consent in writing, signed by them, or by their attorneys, as the case may be, leave the decision of any issue in fact to the Court, provided that the Court, on a rule to shew cause, or a Judge, on summons, shall in their or his discretion think fit to allow such trial."

In argument for the plaintiff the case of *Lismore v. Beadle* (1 Dowl. P. S. N. S. 566) was referred to. There the plaintiff obtained a writ of trial to try before the Sheriff, and the verdict was for the plaintiff. The defendant obtained a rule to set aside the writ of trial and all subsequent proceedings, and it was made absolute, the Judge holding it made no difference that the plaintiff had obtained the writ of trial, and *Lawrence v. Wilcock* (11 A. & E. 941) decided that consent gave no jurisdiction. These cases are clearly such as the Sheriff had no right to try. In giving judgment in the case Lord Campbell said: "Mr. Bramwell was one of the Commissioners of *Nisi Prius*, and when sitting at *Nisi Prius* had the same general jurisdiction to try the cause that a Judge of the Superior Courts had. The Legislature requires that certain preliminaries shall be complied with before the Judge, having general jurisdiction to try causes, shall try a cause without a jury. Therein the case differs from those of writs of trial before the Sheriff; for the Sheriff has no jurisdiction except that derived from the writ of trial. Here, there was general jurisdiction, and the parties, who have consented to the exercise of that general jurisdiction in an instance in

which they knew that the Statutable preliminaries had not been complied with, cannot be allowed to question the jurisdiction on that ground."

Coleridge, J., said: "One of the Commissioners of *Nisi Prius* tried this cause, having the same general jurisdiction for the purpose as any other Judge. I do not wish to lay down that the trial is good for every purpose; for example, I express no opinion whether a witness might be indicted for perjury on the trial; but I decide on the ground that there was sufficient general jurisdiction to try the cause, and that the plaintiff is precluded, by his conduct, from taking this objection."

In the Exchequer Chamber it was urged, on behalf of the plaintiff, that although by consent the parties might have made Mr. Bramwell an arbitrator, then his decision would have taken effect as an award, and would not authorize a *postea* and judgment in the form of that brought before the Court. There would be no authority to order a verdict to be entered, unless that was expressly contained in the submission. The judgment of the Court of Queen's Bench was affirmed. Willes, J., said: "Nothing appears on the record shewing ground for invalidating this judgment: the case comes under the rule that *consensus tollit errorem*."

Echoing the language of Coleridge, J., and applying it to the case before us, I say there was sufficient general jurisdiction to try the cause, and that this applicant is precluded by his conduct from taking this objection.

This brings me to the time of the Judge announcing his intention to deliver a written judgment on the following Tuesday, the 7th of April, at his Chambers, according to Mr. Diamond's statement.

The 106th section, which we were referred to, directs the Judge shall openly in Court, as soon as may be after the hearing, pronounce his decision; but, if not prepared to pronounce a decision *instanter*, he may postpone the judgment, and name a subsequent day and hour for the delivery

thereof in writing at the Clerk's office. The Clerk is to read the decision to the parties or their agents.

Suppose, at the usual sittings of the Court, without any adjournment, the Judge had said, I will deliver a written judgment in this case on a certain day, and had omitted to say at the Clerk's office, or the hour, and the parties, or their agents, on the day went to the office and the Clerk read the judgment; or suppose they read it themselves, would the fact that the Judge had omitted to name the hour or to say he would deliver the writing at the Clerk's office invalidate the judgment? I should think not. Then, will the saying he would deliver the written judgment at his Chambers, instead of the Clerk's office, make the judgment void, when by the Statute the Clerk's office was the proper place for the delivery of the judgment, and it was so delivered, as the affidavits shew, and the defendant's agent went there on that day and took a copy of it, and never apparently raised any objection until after judgment was entered and execution issued, the Judge's Chambers and the Clerk's office both being in the same town, and the defendant's agent, as he shews, having been informed by the Clerk on Saturday morning, the 4th of April, that the Judge had delivered him the judgment in writing in the matter, which the agent examined on Tuesday the 7th, and made a copy of for the defendants?

Under the 107th section the defendant might, as I read the Act, at any time within fourteen days after the 7th of April, have applied for a new trial for all or any of these irregularities, if he had thought proper to do so. There is nothing to shew that he desired to make such application. He permits the plaintiff in the cause to enter judgment and issue execution before he takes any further steps.

I think the proceedings after the 3rd of April would be irregularities in the sense most favorable to this defendant, and afford no ground for this motion.

We intimated when the rule was moved that the swearing of the plaintiff in the Court below was no ground for interfering with the proceedings of the Court below; that

under the first part of the 102nd section the Judge might of his own mere motion, when he thought it conducive to the ends of justice, examine either of the parties under oath. We consider the first part of the section a separate provision from the rest of the section, and the examination of a party at the instance of the Judge has nothing to do with giving a judgment for the sum not exceeding \$8. By referring to the original sections of the Statute before consolidation this appears very plain. There are two sections in the original Statute, shewing clearly they are applicable to different matters.

As to the fourth objection, the affidavit of the Clerk shews that the endorsement on the back of the original summons, signed by the Judge, does fix the day, the 18th of April, on which the defendant was ordered to pay the money.

Ringland v. Lowndes (9 L. T. N. S. 479) is a recent case. There an arbitrator entered on his duties and investigated the matters in difference between the parties and began to act as arbitrator after the expiration of the time within which he was to have made his award, and when the defendant protested against his right to go on and attended before him under protest, the Court held he was bound by the award, having examined witnesses and given evidence before the arbitrator, though under protest.

On the whole, I should consider it a reproach to our law, if an objection of this kind could prevail under the facts that have been brought before us.

If a party appears before Justices and allows a charge, which they have jurisdiction to hear, to be proceeded with, without objecting, he waives the want of an information or summons : *Reg. v. Shaw* (10 Cox, C. C. 66 ; 11 Jur. N. S. 415 ; 12 L. T. N. S. 470)). That was in a criminal proceeding, when the party was brought before a Justice of the Peace charged with an offence, and there was no summons or information. One of the witnesses sworn was afterwards tried for perjury, and it was objected that the Magistrate, before whom the matter was brought, and by whom the

oath was administered, had no jurisdiction: the Court held otherwise. In *Turner v. Postmaster General* (10 Cox, C. C. 115 B. & S. 756) the same principle is enunciated.

See the remarks of Willes, J., in the *Mayor of London v. Cox*, L. R. 2 H. L. Cas. 239, 282, cited in *Pollock and Nicol's Practice of the County Court*, pp. 237, 238.

We think this rule should be discharged with costs.

Rule discharged, with costs.

CRAWFORD V. THE GREAT WESTERN RAILWAY COMPANY OF CANADA.

Railways and Railway Companies—Receipt-note for freight—Special conditions—Damages.

Plaintiff's correspondents in Chicago delivered there to the Michigan Southern Railway Company certain articles of merchandize, to be transported to Toronto for plaintiff, that Company at the time of delivery giving a receipt-note to the effect that they had received from plaintiff's correspondents the merchandise in question, consigned to plaintiff at Toronto, to be transported over their line of road to their terminus, and delivered to the Company whose line might be considered a part of the route, to be carried to the place of destination; the Michigan Company not to be liable as common carriers for the goods whilst at any of their stations awaiting delivery to the Company which was to forward them; with the further proviso, that no Company or carrier forming part of the line, over which the freight was to be carried, should be responsible for demurrage or detention at its terminus, or beyond or on any part of the line, arising from any accumulation or over pressure of business; and that "the Company" should not be liable for the destruction or damage of the freight from any cause whilst in the depot of the Company, or for any loss or damage from "Providential" causes, or from fire, whilst in transit or at the stations.

It appeared that there was an arrangement between the Michigan Company and the defendants that the latter should carry their freight from the terminus of their line to certain points in Canada, and that the freight in question here arrived in Detroit, the terminus of the Michigan Company, who telegraphed defendants' agent, the day before its destruction by fire, that it was in store, and requested them to forward it. It also appeared that at this time defendants had such an accumulation of freight on hand that they could not transport it all over their line, and could not therefore receive plaintiff's goods, which were destroyed by fire at the Michigan Company's Station in Detroit the day after the defendants were advised of their arrival. In an action against defendants for the value of the goods, charging a refusal on

their part to receive them, in consequence of which they became lost to plaintiff, *Held*, that plaintiff could not recover, for that the receipt-note given by the Michigan Company formed the basis of the contract to carry, and that they became the carriers; but that they only undertook to carry over their own line of road, and were plaintiff's agents to deliver over his merchandize to defendants to be carried to Toronto; but that the understanding between the Michigan Company and defendants, that the latter would, on certain terms, carry on the former's freight to Canada, created no privity between defendants and plaintiff, so as to enable him to sue defendants for not carrying out that arrangement; and that, even if defendants were bound to receive the merchandize at Detroit, for carriage to Toronto, the evidence shewed that they were not liable for not receiving, owing to the overcrowded state of their premises, and the pressure of freight upon them.

Held, also, that plaintiff could not, in any case, recover more than nominal damages, if even that, as the value of the goods, which had been destroyed by fire, would not be the damages which would naturally flow from a breach of contract, or refusal, to carry, in disregard of defendants' common law obligation to do so; for that the loss by fire arose from the omission to insure, and it would by no means follow that, even if defendants had received the property, it might not have been on the express condition of exemption from liability in that event.

Held, also, that the condition that "the Company" should not be liable for loss from Providential causes, or from fire from any any cause whatever, &c., applied to the Michigan Company alone, and not to defendants also.

THE first count of the declaration recited that there was a Railway Company in the United States known as the Michigan Southern and Northern Indiana Railroad Company (in the declaration styled "the Company"), who were carriers of goods from Chicago to Detroit, in the United States, and defendants were carriers of goods from the said City of Detroit to Toronto, and defendants entered into an agreement with the said Company that they would, as agents for the defendants, receive goods in Chicago to be carried from Detroit to Toronto by the defendants, and upon the arrival of such goods in Detroit the defendants would, within a reasonable time, upon receiving notice from the Company of the arrival of the said goods, accept and receive them at Detroit from said Company, to be carried by defendants to Toronto; and defendants authorized the Company to receive goods at Chicago, to be carried from Detroit to Toronto upon the terms aforesaid, to be delivered to the parties entitled to receive the same at Toronto; that on 14th April, 1866, plaintiff, at Chicago,

caused to be delivered to said Company, as agents as aforesaid of the defendants, and said Company, as such agents, then received from plaintiff forty-nine packages of yellow grease, to be accepted and received by defendants at Detroit, on their being notified by said Company of the arrival of said goods at Detroit, and required by them to accept and receive the same, and to be safely and securely carried from Detroit to Toronto in the manner and upon the terms aforesaid, and then at the City of Toronto safely and securely to be delivered by the defendants to the plaintiff, for certain reasonable reward in that behalf: *Averment*, that said Company carried and conveyed the goods from Chicago to Detroit, and did notify and inform defendants of the arrival of the goods, and did duly require defendants to accept and receive same, to be carried from Detroit to Toronto pursuant to the agreement on which same had been received by said Company, acting as agents for and on behalf of defendants; yet defendants would not accept and receive said goods at Detroit, although duly notified of their arrival, and requested to accept and receive same by said Company, but wholly neglected and refused so to do from thence hitherto, whereby, through the negligence and refusal of the defendants in the premises, said packages and their contents became and were wholly lost to the plaintiff.

Pleas—1. Defendants did not agree with plaintiff as alleged.

2. Defendants did not enter into any arrangement with said Company, whereby it was agreed they should, as agents for defendants, accept and receive goods at Chicago, to be carried from Detroit to Toronto, as alleged.

3. Plaintiff did not deliver said goods to said Company at Chicago, nor did the Company receive the same to be carried upon the terms and in the manner alleged.

4. Defendants did not neglect or refuse to accept the goods at Detroit, as alleged.

5. That the goods were delivered by plaintiff to said Company, and by the Company received, upon the express

agreement that the Company and the defendants should not, nor should either of them, be liable for any loss or injury happening to them by means of fire before the delivery thereof at Toronto: *Averment*, that the goods were, while in charge of the said Company, burnt and destroyed by fire at Detroit, within the meaning of the agreement; wherefore defendants could not accept or receive the same.

Issue.

At the trial, before Adam Wilson, J., at the Fall Assizes of 1867 for the County of York, it appeared that the defendants for several years past had been in the habit of sending forward from Detroit to certain points, called competitive points, within this Province, goods brought there by American Railways from Chicago over the line of the American roads, the rate charged for the transport to these points by the American Companies being mentioned as a single rate; a certain portion of the amount being allowed for ferriage, and the remainder of the amount apportioned *pro rata* between the American Companies and the defendants.

In practice, when the American Company received the freight, they brought it to a dock on the Detroit River. Defendants sent their boat to this dock, and the freight was put on board of the boat, checked by one of defendants' officers, then brought to Windsor, and thence forwarded to the place of destination in Canada by the defendants. The American Company charged the defendants with their portion of the freight, which was paid them by defendants' cashier, and they received from the consignee in Canada the whole of the freight at the rate fixed for the transport of the goods from Chicago to the place of delivery. After the goods were delivered to the Michigan Company, neither consignor nor consignee had any control over them.

This was the arrangement between the Michigan Southern Railway and the defendants, and by this route plaintiff had on several occasions received articles purchased at Chicago and consigned to him at Toronto. The Michigan

Railway sometimes despatched goods for Canadian consignees from Detroit, the northern terminus of their road, by the Grand Trunk Railway, on the same terms, and the defendants also sent forward merchandize in much larger quantities, received at Detroit from the Michigan Central and Detroit and Milwaukee Railways, the articles received from the last mentioned Companies being sent forward on the same terms. It appeared from the evidence that the terms on which the defendants and the Grand Trunk Railway were in the habit of sending forward from Detroit the merchandize received by them from the American Railways, that had been received in Chicago, were well known to the managers of the railways residing in Chicago, and the latter published advertisements that they would receive, and were constantly in the habit of receiving, produce, &c., consigned to competitive points in Conada, and sending it forward by the Canadian Railways.

On 14th of April, 1866, plaintiff's correspondents in Chicago, delivered there to the Michigan Southern Railway forty-nine tierces of yellow grease, consigned to D. Crawford & Co., Toronto, and by the terms of the receipt-note it was to be transported over the line of that road to the Company's freight station at its terminus, and delivered to such Company or carriers, whose line might be considered a part of the route, for the place of destination of said packages; it being distinctly understood that that Company should not be responsible, as common carriers, for said goods, while at any of their stations awaiting delivery to such carrier; provided, that no carrier or Company forming a part of the line over which said freight was to be transported should be responsible for demurrage or detention at its terminus, or beyond or on any part of the line, arising from any accumulation or over pressure of business.

Amongst the conditions appearing on the face of the receipt-note were the following: "In the event of the destruction or damage of freight from any cause, whilst in the depot of the Company, it is agreed the Company shall not be liable to pay any damage therefor."

It was agreed, and part of the consideration of the contract was, that the Company should not be responsible for any loss or damage to goods occasioned by Providential causes, or by fire from any cause whatever, while in transit or at stations; "the responsibility of the Company, as carriers, to terminate on the delivery of the freight, as per the bill of lading, to the Company whose line may be considered a part of the route to the place of destination of said goods or packages."

The grease arrived at Detroit on Tuesday, 17th April, and was destroyed by fire on the night of Thursday, the 26th April. An officer of the Michigan Company stated that he had left word at the office of an agent of defendants', in Detroit, that they had cotton and grease, and a lot of freight to be sent across, and expostulated with them for not taking it away; and on Wednesday, 25th April, he telegraphed defendants' agent at Windsor, one Croft, who managed their freight department, and had control of the boat in which the freight was sent across, to send boat for freight; and that on 26th another telegram was sent to the same agent, asking when they might expect boat for the Dundas cotton.

The witness did not know how far the agent at Detroit had to do with the through freight. He was at one time local agent at Detroit for freight, and at one time local superintendent.

In the margin of the way bill, sent by the Michigan Company to Detroit with the freight in question, was noted "*viâ* G. W. R. R.;" and a witness, who was in the employ of the Michigan Company, said that, according to his recollection, all plaintiff's grease had been consigned *viâ* defendants' Company, and had been all so forwarded except one lot, which was sent by the Grand Trunk Railway, and the Michigan Company had been found fault with for so doing.

The defendants moved for a non-suit, but the learned Judge overruled the objections, giving the defendants, however, leave to move to renew the motion in Term on the points raised.

The defendants then called evidence to shew that they were in the habit of receiving freight at Detroit from three Railway Companies, as well as from other parties, for which they sent their boat; viz., the Michigan Central, Detroit and Milwaukee, and Southern Michigan, spoken of in this cause as the "Michigan Railway." The proportion of freight received from the other two Railways was two hundred times more than that received from the Michigan (Southern) Company, and it appeared that in April, 1866, the defendants were quite crowded with freight at Windsor and Detroit, all the warehouses being full, the depot at Windsor filled with loaded cars, and the road worked day and night in order to forward freight as rapidly as possible. The cause of the accumulation was the destruction of a bridge at Rochester, which cut off the stream of freight running both ways. When the bridge was re-constructed, there was then a rush of freight. The bridge was repaired two or three weeks before the fire, and defendant's refused to take freight at that time, and received only live stock and perishable freight, and very little of that. When there were many demands on the boat, they sent it to the Michigan Southern in its order, according to the demands on the boat from it and from other places. It would take a boat a couple of hours to go from Windsor to Detroit, take on four or five car loads and return.

The questions left to the jury were: 1st, Whether the defendants received a notice of the goods being at Detroit, to be sent to Toronto.

2. When was such notice (if given) first given?

3. Did such a time elapse from the giving of the notice, and before the happening of the fire, as would have enabled defendants properly and reasonably to have taken the goods from Detroit?

4. Did the defendants constitute the Michigan Company their agents for the carriage of these goods to Detroit, and to be then taken by the defendants and carried to their destination?

The jury retired, and not having agreed as to all the questions, counsel for the plaintiff agreed to take the answer of the jury to those questions on which they had agreed, and to leave the other question to be settled by the Court upon the evidence, who were to draw such inferences as the jury might. On the argument, counsel for defendants, though not present at that stage of the trial when the suggestion of leaving the question for the decision of the Court was made, consented to this.

The jury found there was notice given to the proper officer of the defendants; that such notice was given on the 25th of April, and there was reasonable time after notice, and before the fire, to have taken the goods from Detroit. As to the agency, they could not agree.

On this the learned Judge directed a verdict to be entered for the plaintiff for one shilling damages, subject to be increased to the value of the goods, or for a non-suit to be entered, as the Court might determine, on the finding of the jury and the evidence.

In Michaelmas Term last, *Galt*, Q. C., obtained a rule *nisi* to increase the damages to the value of the goods, pursuant to the leave reserved; and during the same term, *Irving*, Q. C., obtained a rule *nisi* to enter a non-suit, pursuant to leave reserved, or to enter a verdict for the defendants on the fifth plea, on the following grounds of objection taken at the trial:—

1. That there was no evidence of actual delivery to the defendants, nor of such circumstances as would, in law, amount to constructive delivery.

2. There was no evidence that the Michigan Southern Railway Company were the agents of the defendants to receive or collect goods for transport, and no evidence of acceptance by defendants of the goods.

3. That the plaintiff established that the Michigan Southern Railway received the goods on a contract to be carried from Chicago to Toronto, and there was no evidence of any contract with defendants.

4. That the bill of lading shewed that the plaintiff took upon himself all risk of fire over the entire route.

5. That the proof by the plaintiff of the bill of lading entitled the defendants to a verdict on the fifth plea.

6. That the facts determined by the finding of the jury, as to notice, &c., did not create any liability upon the defendants.

These rules were enlarged until this term, when *Irving*, for the defendants, shewed cause to the plaintiff's rule, and supported his own :—

This is an attempt to enforce on defendants the common law liability of carriers as to goods which never came into their possession. The defendants were only bound to carry such goods as they had conveniences for carrying, and on being tendered the reasonable charges therefor : *Johnson v. Midland Railway*, 4 Ex. 367. In *Crouch v. The London and North Western Railway Company*, 14 C. B. 255, the cases as to the common law duty and liability of carriers are collected, and it is there stated that, from the time of the case of *Jackson v. Rogers*, 2 Show. 327, to *Johnson v. The Midland Railway*, there is no reported case of an action having been brought against a carrier for refusing to receive goods, that case also shewing that a carrier can legally be liable as a common carrier for non-delivery of goods beyond the territorial limit of the County in which he receives the goods to be carried.

In *Munster v. South Eastern Railway*, 4 C. B. N. S. 676, the defendants were held liable, notwithstanding the by-law and regulation of the Company, because their Act of incorporation compelled them to carry *the luggage* of their passengers, and they could not discharge themselves from that liability by insisting on such luggage being put up in a particular way, nor by limiting their liability to a peculiar kind of luggage.

The undertaking to carry to Toronto was that of the Michigan Company, and defendants were only their agents for that purpose. The sum charged for the carriage to Toronto was a fixed one for each hundred pounds, covering

the services rendered by both Companies. *Muschamps v. The Lancaster, &c., Railway*, 8 M. & W. 421, sustains this view, as well as subsequent cases. See also *Angell* on Carriers, sec. 95, *note*, and cases there referred to.

Some of the American cases accord with the decided cases in England, and some are opposed to those cases: *Maybin v. South Carolina Railway*, 8 Richardson (So. C.) 240; *South Carolina Railway Company v. Bradford*, 10 Richardson (So. C.) 221, 307; *Packard v. Getman*, 6 Cow. 757.

As to notice, it should have been to the person who directed the movement of the boat. The notice to the Detroit agent, who had nothing to do with the management of the boat, was not sufficient.

It could not be inferred that the Michigan Company were defendants' agents to receive these goods. The defendants had an agent in Michigan, and no other agent can properly be shewn. Defendants were the agents of the Michigan Company to forward the goods for them from Detroit to Toronto, and under the terms of their bill of lading they were not, nor were defendants, liable for losses occasioned by fire. *Collins v. Bristol and Exeter Railway Company*, 7 H. L. Cases, 194, is authority on both these latter points, and shews that defendants ought to have a verdict on the fifth plea, or a non-suit on the same ground. See also *Benett v. The Peninsular and Oriental Steamboat Company*, 6 C. B. 775.

Gwynne, Q. C., contra:—

There can be no non-suit, for two of the issues are found for the plaintiff. The issue on the fifth plea is really found for plaintiff also. *Collins v. The Bristol and Exeter Railway*, as reported in 5 Jur. N. S. 1367, shews that, if the contract had been similar to what it was in this case, judgment would have been in favour of the plaintiff. The tenth condition endorsed on the bill of lading in that case is referred to in the judgment of Watson, B., at p. 1368, 9, and the Lord Chancellor, 1374.

If it was intended to exclude the liability of defendants'

Company, it should have been expressed. The Michigan Company may have been the agents of the defendants to contract for the whole way.

There is no undertaking by the Michigan Company to carry beyond their terminus, and the provision excluding liability from fire extends to that Company alone. The whole case turns on the second plea, and under it defendants' liability is admitted. They are authorized by 18 Vic. ch. 176, sec. 21. to own and employ steamboats on the Detroit River, to facilitate their traffic, and, under 22 Vic. ch. 116, sec. 11, to lay down rails and extend their railway into the United States, for the purpose of increasing their business.

The evidence shews, at all events, that the Michigan Company were agents for the plaintiff to deliver the articles in question to defendants' Company for him. On this point, and as to the general liability of carriers, and evidence to establish agency, see *Pole v. Leask*, 6 Jur. N. S. 1104, 2 L. T. N. S. 737, 8 L. T. N. S. 645; *Brocklebank v. Sugrue*, 5 C. & P. 21; *Smart v. Sandars*, 5 C. B. 895; *Edwards v. Sherratt*, 1 East, 604; *Riley v. Horne*, 5 Bing. 217; *Burrell v. North*, 2 C. & K. 680.

The action is not one in the nature of assumpsit, but of tort. As to action for not receiving, see *Angell* on Carriers, secs. 124, 356, 418, 519. If it was intended to set up as a defence want of tender of the money, it should have been pleaded: *Redfield* on Railways, 240, 242, 252. If the goods were not received by defendants, they are liable for not receiving them. The American case, already referred to, in 8 Richardson, went off on a question of pleading, and the plaintiffs were allowed to amend, as appears on p. 264 of the report of the case.

Irving, in reply:—*Mytton v. Midland Railway*, 4 H. & N. 615, is a strong case in favour of defendants, and shews conclusively that there is no privity between them and plaintiff, as carriers, even if they had received the goods from the American Company, which there is no evidence to shew they did.

RICHARDS, C. J., delivered the judgment of the Court.

The evidence given at the trial shews that the actual contract to carry the merchandize in question was made by the Michigan Company. The effect of the receipt given by them is, that they had received of plaintiff's correspondents in Chicago forty-nine tierces of yellow grease, consigned to D. Crawford & Co., Toronto, C. W., "to be transported over the line of that road to the Company's freight station at its terminus, and delivered to the Company whose line may be considered a part of the route to the place of destination of the said goods: the (Michigan) Company not to be responsible, as common carriers, for the goods, whilst at any of their stations awaiting delivery to such carrier: the rate of freight for the transportation of said packages from the place of shipment to Toronto not to exceed 30 cents per 100 pounds; and no carrier or Company, forming part of the line over which said freight is to be transported, will be responsible for demurrage or detention at its terminus, or beyond or on any part of the line, arising from any accumulation or over pressure of business."

Although the merchandize was consigned to the plaintiff at Toronto, the nature of the receipt given by the Michigan Company, to which I have referred, and which must be considered as the basis of the contract to carry, shews that all that that Company undertook was to carry to their station at the terminus of their road, and deliver to the Company, whose line was a part of the route, to the place of destination.

In *Collins v. The Bristol and Exeter Railway* the receipt note given by the Great Western Railway Company was, in effect, "Received the undermentioned goods, to be sent to Torquay station, and delivered to R. C. Collins, consignee, or his agent." The goods were delivered at the Great Western station in Bath. They were forwarded by that Company to Bristol, the terminus of their line, and were then handed over to the Bristol and Exeter Company,

the defendants, whose line joined the Great Western Company at Bristol and terminated at Exeter, at which place it was joined by the line of the South Devon Railway, which line runs on to Torquay and other places. The goods were destroyed by fire in the shed of the defendants' Company at Bristol. It was proved that it was the custom of the defendants to receive traffic, as the next carriers, from the Great Western Railway, and to forward it, receiving for so doing a mileage proportion for the carriage. When the action against the Bristol and Exeter Company came first before the Court of Exchequer, the plaintiff contended that the undertaking of the Great Western was only to carry to the end of their terminus, and there to deliver to defendants' Company; that the special conditions endorsed on the receipt-note only applied to the Great Western Company, and as they had delivered the articles to defendants, as his agent, and the latter Company had received the same to carry without conditions, they had incurred the common law liability of carriers, and were answerable for the destruction of the goods by fire, though the Great Western were not, in consequence of the condition contained in the receipt. The Court of Exchequer, however, held that the Great Western Company had undertaken to carry from Bath to Torquay, and that the defendants and the South Devon Company were merely their agents, and consequently defendants were not liable. The fourth condition endorsed on the receipt-note granted by the Great Western was, "that they would not be answerable for the loss of, or for damage to, any goods, arising from fire;" and the 10th endorsed was to the effect that "goods addressed to consignees resident beyond the limits of the Company's local regulation for delivery of goods from the different stations on the Railway, and respecting which no directions to the contrary shall have been received, will be forwarded to their destination by public carrier, or otherwise, as opportunity may offer; or, at the option of the Company, will be placed in shed or warehouse, pending communication with the consignee, at the risk of the

owners, as referred to in clause No. 4. The charges of the carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as completed, and the responsibility of the Company considered to have ceased, when the carriers shall have received the goods for further conveyance"; and the Company gave notice that any money received by them, as payment for the conveyance of goods by other carriers beyond their limits, would be received only for the convenience of the consignors, for the purpose of being paid to such other carriers, and would not be received as a charge made by the Company upon the goods in the capacity of carriers, beyond the extent of their own Railway; and they further gave notice that they would not be responsible for any loss, damage, or detention, that might happen to goods so sent by them, if such loss, damage, or detention, occurred beyond their said limits; and, 13thly, the above conditions should apply to all goods received by the Company at all or any of their offices and warehouses, wherever situated; and as to all goods entrusted to them, they would only agree to carry them subject to the above conditions, and to all other the rules and regulations of the Company.

In giving judgment, Alderson, Baron, said: "We clearly think the contract for the conveyance of the van and furniture was one contract, and made with the Great Western Railway Company alone. They contracted in express terms, upon the face of the receipt-note, to carry the goods from Bath to Torquay, and if anything is contained in the tenth condition repugnant to this contract, it could not affect it."

In the Exchequer Chamber, reported in 1 H. & N. 518 the decision of the Court of Exchequer was reversed. Crompton, J., in giving judgment, said: "The construction we put on the (tenth) condition is, that they, the Great Western Company, will not be carriers beyond the extent of their own Railway, but that they will receive the entire sum to pay themselves, as carriers on their own line, and

then will, as forwarding agents, pay the residue, after their own charge, to the next railway or other carrier, being responsible, as carriers, no further than the extent of their own line. We think that by the fourth condition, the Great Western Company only stipulated as to their own individual responsibility. They say that the Great Western Company gives notice that *they* will not be liable for loss by fire. * * * It appears to us that the Great Western Company received the goods to be carried on their line, with a stipulation for their own interest, excepting loss by fire from their responsibility, and that they, according to the agreement, discharged themselves by forwarding the goods to be carried by the defendants' Company. We have no evidence what were the terms on which the goods were to be carried by the defendants' line, and we must therefore treat them as received to be carried by the defendants, as common carriers, and consequently, in the absence of a special contract of exemption, subject to responsibility for the loss from fire."

When the case was taken into the House of Lords, reported in 7 H. of L. Cases, 194, 5 Jurist, N. S. 1367, the decision of the Exchequer Chamber was reversed, and that of the Court of Exchequer affirmed. The Law Lords were unanimous in reversing the judgment of the Exchequer Chamber. They considered there was an express contract to carry by the Great Western Company, and the tenth condition endorsed on the receipt-note did not alter that undertaking, that it only extended to goods sent forward by carriers when they were sent beyond the point to which they themselves had agreed to forward them.

They were also of opinion that inasmuch as the Great Western was the only Company liable to the plaintiff, and the other Companies carried the freight forward as their agents, the only remedy of the plaintiff was against the Great Western Company, and as they were relieved from the responsibility of loss by fire under the terms of the receipt-note, plaintiff could not recover at all.

I think that the grounds on which Collins against the Railway was decided, are such as shew, under the established facts in this case, that the Michigan Company were carriers of these goods over their own line of railway, and not through to Toronto, and that they were plaintiff's agents to deliver over his merchandize so brought to Detroit to defendants, to be carried to Toronto.

In relation to the understanding between the Companies, that defendants would carry freight sent forward by them over their line, on certain terms, to certain points in Canada, I fail to see how that creates any privity between defendants and the plaintiff, to enable him to sue them for not carrying out that arrangement, or how he is bound to relieve the carriers from Detroit to Toronto from certain common law liabilities, because he had expressly agreed to relieve the Michigan Company from such liabilities, unless by the terms of the receipt itself, and the conditions endorsed, it can be fairly inferred that the merchandize referred to in it was to be carried forward by the other Companies on the line of the route, according to those terms, or some of the terms expressed in the conditions of the receipt-note, by which the carriers were to be released from responsibility.

Then, assuming the Michigan Company to be the agents of the plaintiff to deliver the merchandize to the defendants at Detroit, and that they were bound to receive it there, has the plaintiff shewn a state of facts to render defendants liable for not receiving it?

Taking the finding of the jury, for the present, as establishing the notice to the defendants of the merchandise being at Detroit, and that such notice was given within a reasonable time to have enabled defendants to take the goods away before the fire occurred, how does the plaintiff shew that defendants had "ample and sufficient conveniences for receiving and carrying the said goods, and that he offered to pay for the carriage?" This is the form of the allegations in the declaration in *Johnson v. The Midland Railway* (4 Ex. 367), and in giving judgment in that

case, Parke, Baron, after referring to *Lane v. Cotton* (12 Mod. 484), and the law as there laid down by Lord Holt says: "Until the carrier retracts, every individual, provided he tenders the money at the time, and there is room in the conveyance, has a right to call upon him to receive and carry goods, according to his public profession. Now, if the defendants stand in the situation of carriers at common law, they are not liable, because * * * and it is further found as a fact, they had not the conveniences for so carrying."

Mr. Gwynne contended, in his argument, that the defendants should have replied that plaintiff did not offer to pay for the carriage of the goods, if they wished to set that up by way of defence. Perhaps, the course of business there, as far as the plaintiff was concerned, might be urged as a reason why he should not be called on to shew an offer to pay. He had, on several occasions before this, ordered his merchandize for Toronto to be sent over defendants' line from Detroit, and it had been done in every instance but one, and no objection made to take it. Still, the difficulty remains as to the defendants then having the conveniences for carrying plaintiff's freight. The evidence shews that the warehouses, stations, and cars of defendants were full crowded in every way, quite as much so as the stage-coachman's carriage when the seats are full, or the carrier if his horses "be loaded," as mentioned by Lord Holt, and under such circumstances it does not seem reasonable that defendants should be held liable to an action for not receiving goods to be carried.

If, in the way the case was left at *Nisi Prius*, we are to decide as a matter of fact on this question, we should hold that under the evidence defendants are not liable for not receiving these goods, owing to the crowded state of their premises and the pressure of freight upon them.

In any view we can take, if the defendants are to be held liable for not receiving, we fail to see how the verdict is to be increased beyond nominal damages; even if they can properly be liable for that. The value of the goods


would not be the damages which would naturally flow from a breach of a contract to carry, nor for a refusal to carry, in disregard of defendants common law obligation to do so. The additional expense a party might be put to in getting his goods forwarded, the ordinary damages which would reasonably follow from the delay in not reaching their destination, as they would, if defendants had received them to forward—these, and the like, seem to be the reasonable and natural damages that would follow the refusal to carry. The loss from the destruction of the property by fire is a damage that arises from plaintiff's omission to insure, and it would by no means follow, if defendants had received the property, that it might not have been received on the express terms of relieving them from liability in case of loss by fire.

In *Crawford v. The Grand Trunk Railway Company*,* decided last term, and in some other recent cases in this Court, we had occasion to refer to the later decided English cases on the subject of damages, and after giving the matter our best consideration, we do not think, under the facts of this case, if plaintiff is entitled to recover at all, that we should be at liberty to increase the damages; and in that view, plaintiff's rule to increase the damages must be discharged.

Much may be said in favor of the view that the condition exempting *the Company* from loss by Providential cause, *or by fire from any cause whatever, while in transit or at stations*, applies to whatever company may have possession of the goods when the accident occurs, and would exempt all the companies from such loss. I think, however, that is not the view to be taken of the condition. There are terms in the receipt-note which apply expressly to other companies, viz., that part of the proviso that declares no carrier or company forming a part of the line, over which said freight is to be transported, will be responsible for damage or detention at its terminus or

* Not reported, but the cases there referred to were *Hadley v. Baxendale*, 9 Ex. 341, and *Wilson v. Newport Dock Company*, L. R. 1 Ex. 177.

beyond, or on any part of the line, arising from any accumulation or over pressure of business," and doubtless the rate of thirty cents per one hundred pounds freight would apply to cover the freight over both lines. But after that proviso is added, "upon the following conditions:"

1. The owner or consignee to pay freight or charges, as per specified rates, upon the goods as they arrive: time not guaranteed." This might, perhaps, apply to all the companies. Then commences a new paragraph with a 

2. (The first one was commenced in the same way) "Freight carried by this company must be removed from the station during business hours on the day of its arrival, or it will be stored at the owners risk and expense, and in the event of its destruction or damage from any cause, while in the depot of the company, it is agreed that the company shall not be liable to pay any damage therefor." 3. Then a new paragraph without an index: "It is agreed, and is part of the consideration of this contract, that the company will not be responsible for leakage of liquids, breakage of glass, or queensware, the injury or breakage of looking-glasses, glass show-cases, picture-frames, stove-castings, or hollowware; nor for injury to the hidden contents of packages, nor for loss of weight, or otherwise, of grain and coffee in bags, or rice in tierces; nor for the decay of perishable articles: nor for any damages arising to any article carried from the effects of heat or cold; nor for the loss of nuts in bags, or lemons or oranges in boxes, unless covered with canvass; or loss or damage to goods occasioned by Providential causes or by fire from any cause whatever, while in transit or at stations." Then another paragraph, without an index: 4. "The Company will not be responsible for damages on tobacco, unless it is proved to have occurred during the time of its transit over this road, and of this notice must be given within thirty hours after the arrival of the same." Then another paragraph: 5. Freight to be paid upon the weight by the company's scales." Then a new paragraph with an index: 6. "This Company not responsible for accident or delays from unavoidable causes.

The responsibility of this company, as carriers, to terminate on the delivery of the freight, as per this bill of lading, to the company whose line may be considered a part of the route to the place of destination of said goods or packages."

Another paragraph, without an index :

7. "In the event of the loss of any property, for which the carriers may be responsible under this bill of lading, the value or cost of the same at the point and time of shipment is to govern the settlement for the same; and in case of loss or damage of any of the goods named in the bill of lading, for which this company may be liable, it is agreed and understood that they may have the benefit of any insurance effected by or on account of the owner of the said goods."

8. "Flour barrels and all packages subject to the necessary cooperage: gunpowder and friction matches not carried: the receipt to be presented without alteration or erasure."

It appears to me that "the Company," mentioned in the third condition, refers to the Michigan Company, and is only intended to free them from liability. If it had been intended to extend to the whole line of transit, it would have been easy to have said, "no company forming part of the line of transit shall be responsible, &c.," or "the consignee or owner shall not have any claim for breakage, &c."

If the wording of the sixth condition is to be held to apply to any but the Michigan Company, then its language would shew that that used in the third condition did not extend to the other companies; and if the condition is not to apply to any but the Michigan Company, it does help the argument that the third condition would apply to relieve defendants' company from the loss by the fire, if otherwise responsible. I think we cannot, in that view, order a verdict for the defendants on the fifth issue.

If we are to consider the issues, on which the verdict should be entered for the defendants separately and distinctly, we have arrived at the conclusion that, as to the

first plea, the defendants did not agree with the plaintiff as alleged, if that is the real issue intended to be raised by the plea. Then the second and third issues ought also to be for the defendants.

The fifth issue should be for the plaintiff; and as to the fourth plea the jury have found, in effect, that the defendants neglected to receive the goods, as alleged; but, under the facts shewn, we are of opinion they were not guilty of negligence in not sending their boat for plaintiff's merchandise in the then state of their warehouses and cars, filled with freight, and the want of conveniences for sending it forward.

The case of *Mytton v. The Midland Railway*, referred to by Mr. Irving, sustains the distinction laid down in *Collins v. The Bristol and Exeter Railway*, that the company receiving the goods, and distributing the rate of transport over the different companies, may be responsible for a loss not on the line of the company. There, the plaintiff took a ticket at the Newport station of the South Wales Railway Company to Birmingham, for which he paid the entire fare. The South Wales Company extends to within twelve miles of Gloucester, which latter distance is traversed on the Great Western Railway, and the Midland Company have a line from Gloucester to Birmingham. By arrangement between the three companies tickets are issued for the entire distance, and the fares were divided between them according to the mileage travelled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales Railway carriage and delivered it to the guard of the Midland Railway Company. On the arrival of the train at Birmingham, the portmanteau was missing. The plaintiff having sued the Midland Railway Company for the loss, *Held*, that the contract was an entire contract with the South Wales Railway Company to convey the whole distance from Newport to Birmingham, and consequently the Midland Company were not liable. It was stated in the judgment of Martin, Baron, that the Act of Parliament incorporating the South Wales Railway

Company contained a provision by which every passenger travelling on the railway is to take his baggage at his own risk. There was no such enactment in the Midland Railway's charter. The learned Baron also said, in giving his judgment: "We are of opinion there was but one contract, and that contract was with the South Wales Railway Company and not with the Midland Railway Company. There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the Midland Railway Company to that contract, except that, by arrangement with the South Wales Railway Company, they conveyed on their line passengers booked from Newport to Birmingham."

And so here, as between the plaintiff and defendants, there is no privity between them as to any contract. There is an arrangement between these defendants and other American Companies, and the Michigan, that they will convey on their line freight booked from Chicago to certain points in Canada: there is consequently no privity between plaintiffs and defendants in relation to any contract.

Postea to defendants on first, second and third issues; on the fifth issue to plaintiff; and verdict for plaintiff on fourth issue to stand; plaintiff's rule discharged.

EAKINS V. CHRISTOPHER.

Malicious arrest—Pleading.

The plaintiff declared against the defendants for malicious arrest, in the form prescribed by C. S. U. C. ch. 22, schedule B, No. 27 :

Held, sufficient.

Held, also, that it was not necessary for plaintiff to shew that the action, in which the arrest took place, was at an end, or that he had been discharged from the arrest, and the order of the Judge under which it had been made set aside.

DECLARATION, that defendants, having no reasonable or probable cause for believing that the plaintiff, unless forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally, or defendants in particular, maliciously represented that such was the fact, and thereupon maliciously procured a Judge's order for the issue of bailable process against said plaintiff, and caused plaintiff to be arrested, and held to bail for three hundred and four dollars and four cents.

Plea, that defendants procured said order by shewing to the Judge, who made the same, by a proper affidavit, that they had, as in fact they had, a cause of action against plaintiff, to the amount of upwards of one hundred dollars, and by also shewing by affidavit such facts and circumstances as satisfied said Judge that there was good and probable cause for believing that plaintiff, unless forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally, or defendants in particular, which affidavit was made in good faith and without malice.

Demurrer—The facts alleged in said plea immaterial and no defence. The fact that the Judge, who ordered the arrest, was satisfied that plaintiff, unless forthwith apprehended, was about to quit Canada, with intent in said plea alleged, no excuse for the wrongful act of defendants, who set Judge in motion, and not shewn that defendants' conduct in respect of said arrest was legal or proper, or *bonâ fide*, or that there were sufficient grounds to cause plaintiff's arrest, or that plaintiff was in fact about to abscond with intent in said second plea mentioned.

Exceptions to declaration :—

1. Not alleged that plaintiff did not by affidavit shew to a Judge facts and circumstances sufficient in law to justify making said order and issuing said process, or that said order was not made upon a proper and *bonâ fide* representation by affidavit of such facts.

2. Allegation that defendants maliciously represented they had reasonable or probable cause for believing plaintiff, unless forthwith apprehended, was about to quit Canada, with intent, &c., not sufficient, as defendants might have had such reasonable and probable cause, and as belief of defendants in facts alleged, as grounds for order to hold to bail, immaterial.

3. Allegation that defendants maliciously procured order and caused arrest of plaintiff insufficient, inasmuch as defendants not liable to this action by reason of malice only.

4. Not alleged that said order or process issued thereunder set aside.

Spencer, for the plaintiff, cited C. S. U. C. ch. 24, secs. 5, 12; *Ross v. Norman*, 5 Ex. 359.

C. S. Patterson, contra, cited *Daniel v. Fielding*, 200.

RICHARDS, C. J., delivered the judgment of the Court.

This declaration is in the very words of the form No. 27, in Schedule B, referred to in sec. 87 of the Common Law Procedure Act.

That section declares these forms shall be sufficient, and those and the like forms might be used, with such modifications as might be necessary to meet the facts of the case.

Chapter 24 of the Consol. Stat. U. C. sec. 5, similar in effect to Imperial Stat. 1 & 2 Vic. ch. 110, sec. 3, enacts that if any person, by the affidavit of himself or some other individual, shews to the satisfaction of a Judge that such party or plaintiff has a cause of action against such person to \$100 or upwards, and also by affidavit shews such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that such person, unless

he be forthwith apprehended, is about to quit Canada, with intent to defraud his creditors generally, or the said party or plaintiff in particular, the Judge may issue his order directing such person to be held to bail.

In *Daniels v. Fielding* (16 M. & W. 200) the allegations were that defendant, not having any reasonable or probable cause to believe that the plaintiff was about to quit England, falsely and maliciously, and without any reasonable or probable cause, caused and procured a Judge to make an order for a *capias* against the plaintiff, and falsely and by colour of said order caused a *capias* to be sued out thereon, and plaintiff to be arrested under it.

Baron Rolfe, on a motion after verdict to arrest judgment, shews how the action for malicious arrest on such process, in a civil suit in England, after the passing of the Imperial Statute, differs from what it was before the change of the law. He said: "The foundation on which the action must now rest, is, that the party obtaining the *capias* has imposed on the Judge by some false statement, some *suggestio falsi*, or some *suppressio veri*, and has thoroughly satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country. * * * * It is essential under the present Statute that the plaintiff in an action for malicious arrest should allege falsehood or fraud in obtaining the original order. The action, in its character, is similar to an action for a malicious prosecution on a criminal charge, and the declaration ought, therefore, in analogy to the course of pleadings in such an action, to state what the false charge or statement was by which the Judge had been misled. This declaration seems to be framed on the erroneous notion that the gist of the action is the arresting by the defendants at a time when they had no reasonable or probable cause for believing that the plaintiff was going abroad." He nevertheless thought the declaration, after verdict, might be supported.

The declaration in that case averred that the order to

hold to bail was rescinded, the writ of *capias* set aside, the bail bond delivered up to be cancelled, and that the defendants were ordered to pay the costs of the arrest, whereby the plaintiff was actually discharged from the arrest and the proceedings relating thereto. This was decided in 1846.

In *Ross v. Norman* (5 Ex. 359, in 1850) the declaration stated the defendant, not having any reasonable or probable cause of action against plaintiff to the amount for which he maliciously caused him to be arrested, falsely, maliciously, and unjustly procured from a Judge an order for a *capias*, by falsely and maliciously representing to the Judge that the plaintiff was justly and truly indebted to the defendant in a certain sum, by means of a false affidavit then shewn and uttered by defendant before the Judge, and thereupon maliciously caused a *capias* to be issued, and without any reasonable or probable cause of action caused the plaintiff to be arrested: *Held*, on demurrer, that the false statement need not be more particularly set out in the declaration on which the Judge made the order, nor show that the facts were false, within the defendant's knowledge, or that he had not reasonable or probable cause for believing them to be true.

In this declaration there was an averment that the principal action was terminated by being discontinued. The form of the declaration, No. 27, in Schedule B, to the Common Law Procedure Act of Upper Canada, 1856, occupies the place, in relation to the forms which precede and follow it, that No. 31 did in the English Common Law Procedure Act. But No. 31 in that Act was a form for infringing a patent, and No. 27 in the Provincial Statute is, "that the defendant, having no reasonable or probable cause for believing that the plaintiff was immediately about to leave Upper Canada, with intent and design to defraud the defendant, maliciously caused the plaintiff to be arrested, and held to bail for £ "

The form, therefore, appended to the Common Law Procedure Act, as consolidated, was altered, no doubt, with

the intention of meeting the change made by the Statute of 22 Vic. ch. 96, consolidated as chapter 24 in Consolidated Statutes of Upper Canada.

The plaintiff here declares in the very words of the form given in the schedule to the Common Law Procedure Act, and a form no doubt framed to meet a case where the Judge was imposed upon by some false statement of the plaintiff in granting the order; and yet, as said by Baron Rolfe, in his judgment, a plaintiff might not himself believe a defendant was about to leave the country, though he might, without fraud or falsehood, on an affidavit fairly stating the facts, satisfy a Judge that the defendant was about to leave the country. In such a case could he properly be made liable for the arrest, though he may have acted maliciously?

It seems to me, as to this part of the argument, on the deficiency of the declaration, we must decide either it is sufficient, to make out a case against the defendant, to prove the allegations in the declaration, or that the declaration in its present form being good by the Statute, the plaintiff must on the trial shew such facts as to fraud and falsehood as will maintain the action, though he may then be required to prove more than is alleged in the declaration.

The next question is, is it necessary that the plaintiff should shew the action in which the arrest took place at an end, or that he has been discharged from the arrest, and the order of the Judge in making it set aside?

Where the allegation is that there was no reasonable or probable cause for believing any debt due, or a debt for so large an amount was not due, the reason why an action for a malicious arrest as to those allegations cannot be maintained, until the suit in which the arrest took place is ended, is, because it may appear by the result of that suit that the debt and the amount of it were really due, and the Court will not permit two actions to go on at the same time to ascertain that matter, nor allow it to be alleged of a pending suit that it is unjust: this can only be decided by a judicial determination of it finally.

But here the grievance complained of has nothing to do with the result of the suit. The parties cannot try in that action whether the plaintiff intended to leave Canada or not; nor can it be a question in that suit whether the defendant had reasonable or probable cause for so believing.

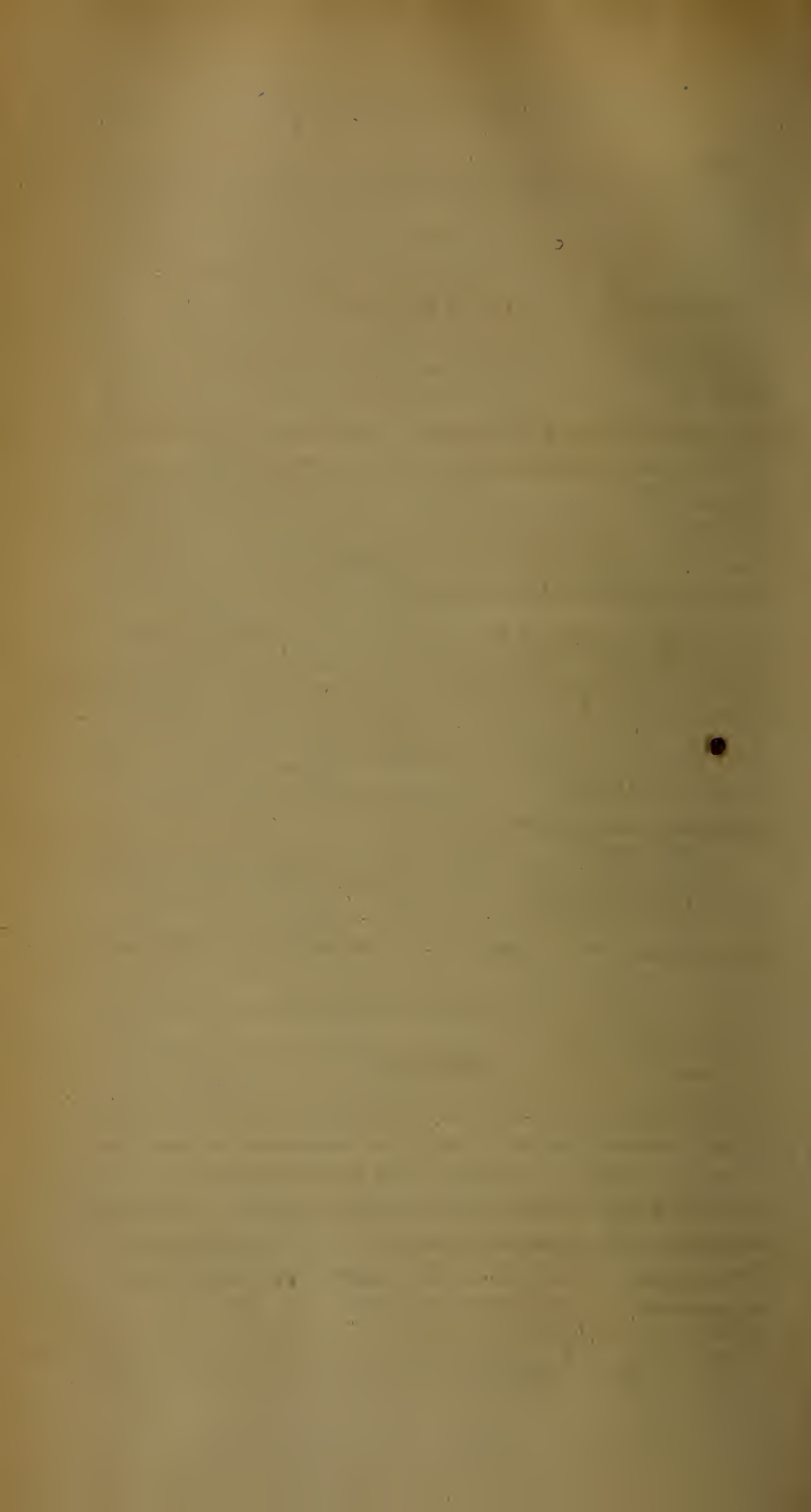
It is argued that the plaintiff in the original suit might have applied to a Judge to set aside the arrest, by shewing that he was not about to leave Canada, and that that course should have been taken before bringing the action. In the case of *Gilding v. Eyre* (10 C. B. N. S. 592) there is a lengthy discussion on a similar point. Mr. Justice Willes, in giving judgment, said: "The whole force of the argument, so ably put forward by the defendant, rests upon the assumption that the order of a Court or Judge for the plaintiff's discharge from custody was the only way of legally determining the former proceedings, by ascertaining the illegality of the arrest complained of, whereas in truth that illegality altogether depends on the amount for which the arrest was made being greater than the sum due, a fact which could only be decided conclusively between the parties by the verdict of a jury."

In the above case, however, the alleged illegal conduct arose from improperly endorsing a writ after judgment.

Judgment for plaintiff on demurrer.

MEMORANDA.

The following gentlemen were called to the Bar during this Term:—WILLIAM BARRETT, ALEXANDER GOFORTH, ZEBULON AITON LASH, WILLIAM BELL, WILLIAM MULOCK, WILLIAM BARCLAY McMURRICH, JAMES DINGWALL, GEORGE FREDERICK HARMAN, EDWARD BALDWIN FRALECK, FRANCIS ALEXANDER HALL, WILLIAM HENRY MOORE, NICHOLAS SPARKS.



DIGEST

OF

CASES REPORTED IN VOL. XVIII., HILARY TERM, 31 VIC.
TO EASTER TERM, 31 VIC.

ABANDONMENT.

Notice of, in Marine Insurance.—
See MARINE INSURANCE.

ACCIDENT.

1. See RAILWAYS AND RAILWAY COS.

ACQUIESCENCE.

See LANDLORD AND TENANT, 4.

ADJOURNMENT.

*Of hearing of cause to³ Chambers
by Division Court Judge.*—See
DIVISION COURT.

AFFIDAVITS.

*Entitling of, in applications for
Prohibition.*—See DIVISION COURT

*In garnishment proceedings—by
whom to be made.*—See ATTACH-
MENT OF DEBTS.

AGREEMENT.

*By tenant to purchase demised
premises.*—See LANDLORD AND
TENANT, 2.

To continue to run vessel.—See
PLEADING, 2,

*To support illegitimate child, good
plea to action of seduction.*—See
PLEADING, 7.

ALIENATION OF LAND.

*Ejectment—Devise—Condition in
partial restraint of alienation.*

A testator, who died in 1854, de-
vised certain land to his two sons
in fee, “but not to be assigned to
any person, except a son of his, for
the term of twenty years from the
day of his decease”:

Held, that the condition was not
void, as in general restraint of
alienation, and that the plaintiff, who
claimed, in ejectment, under a title
derived from the sons, in violation
of this condition, could only re-
cover such portion of the land as

they were entitled to as heirs of their father.—*Pennyman v. McGrogan et al.*, 132.

AMENDMENT.

Action for flowing back water—Real point in controversy—Amendment.

In an action for flowing back water upon plaintiff's land, on an objection raised by defendant at *Nisi Prius* as to the right, on the pleadings, to recover for more than so backing water on the plaintiff's land as to interfere with the working of his mill, the Judge allowed an amendment of the declaration, so as to test the right of defendant to overflow any portion of the land in question. Defendant at the time made no objection that this amendment would be letting in a matter which was *not* the real question in controversy, but merely insisted he could not then proceed with the trial, which was thereupon postponed. It also appeared that there had been several trials many years before between plaintiff and other parties, in which damages were claimed for flowing back on the land as well as on the mills, and it was not denied by the defendant that the question on the previous trial of this suit was the right to overflow the land at all, nor that the objection made at the second trial, when the amendment was applied for, had never been before raised, though there had been three entries of the record for trial and two references to arbitration between the first trial and the last entry of the record :

Held, that the amendment had been properly made. — *Smith v. Wallbridge*, 180.

See PLEADING, 2.

APPEAL.

See INSURANCE, 2.

“ BRIDGE.

“ INSOLVENCY, 1.

ARREST.

See MALICIOUS ARREST.

ASSIGNMENT.

To non-resident official assignee.—
See INSOLVENCY, 2,

Of lease not under seal.—See
LANDLORD AND TENANT, 4.

See INSOLVENCY, 1.

ATTACHMENT.

See INSOLVENCY, 1.

ATTACHMENT OF DEBTS.

Garnishee an executor—Nature of indebtedness—Affidavit for order, who to make—Costs.

Held, 1. That the mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him, as such executor, to the judgment creditor.

2. That the judge, to whom an application for an attaching order is made, should require the nature of the indebtedness to be fully stated ; but where the Judge nevertheless granted an order without this statement, the Court, as the Statute does not expressly require it, refused to set the proceedings aside on this ground.

3. That an order founded on the affidavit of “ the agent for the above defendant,” without any affidavit by the judgment creditor or his at-

torney, is irregular ; and such order was in this case set aside, but, the point being new, without costs. *Semble*, that had it been affirmatively shewn that the deponent was in fact the attorney of the judgment creditor, though not so described in the affidavit, the Statute would have been complied with.—*Tiffany v. Bullen*, 91.

upon in good faith, and that the proceeds thereof had been applied by the defendants for the purposes of the company, and to enable them to maintain their credit and pay their debts, the verdict in the plaintiffs' favour was upheld.—*Currier et al. v. Ottawa Gas Company*, 202.

See MERGER.

See CONDITION PRECEDENT.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Incorporated Co.—C. S. C. ch. 65
—*Informality in appointment of directors*—*Pro. note signed by President*
—*Bona fide holder*—*Liability of Co.*
—*New trial refused*.

A company, incorporated by Con. Stat. of Canada, cap. 65, were empowered, amongst other things, to borrow money for purposes specified in the Act, and through their president were authorized to make promissory notes, &c. The president, acting upon a resolution of the directors to that effect, signed the promissory note in question. In an action upon the note, it appeared that the board of directors had not been appointed in the manner required by the provisions of the Act of incorporation : *Held*, that the resolution sufficiently complied with the Act, and that inasmuch as the Statute vested in the directors the power of authorizing the president to sign notes to bind the company, a person accepting such notes in good faith, the proceeds of which were applied for the benefit and purposes of the company, might presume that the proper authority had been given by the directors to the president to sign the same ; and it appearing that the plaintiffs in this case had accepted the note sued

BOUNDARIES.

Of a lot, in the original survey of towns and villages, shewn by the work upon the ground.—See SURVEY OF TOWNS AND VILLAGES.

BRIDGE.

Appeal—*Bridge lying between two Counties*—*Joint liability to maintain*.

The Counties of Simcoe and Ontario are connected by a draw-bridge between the two counties, over a water-channel, called "The Narrows," on Lake Simcoe.

By sec. 327 of C. S. U. C. ch. 54, where a bridge lies wholly or partly between two counties, the councils of such municipalities shall have joint jurisdiction over it.

The bridge in question here having been left open, the plaintiff, who was passing along the highway, fell into "The Narrows," and was injured :

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 43, *VanKoughnet, C., dissentiente*, that the defendants were liable to plaintiff in a civil action for the damage sustained by him ; that the word "between" must be construed in its popular sense, and that where a bridge is constructed over navi-

gable waters, and connects two opposite shores lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water and are divided only by the invisible untraceable line called *medium filum aquæ*.—*Harold v. The Corporation of the County of Simcoe, and the Corporation of the County of Ontario*, 9.

BY-LAW.

See REPLEVIN, 1.

CANCELLATION.

Of lease of demised premises.—*See LANDLORD AND TENANT*, 2, 3.

CERTIFICATE.

On married woman's deed.—*See MARRIED WOMAN*.

COMMON SCHOOLS.

See PLEADING, 1.

COMPETENCY OF WITNESS.

See WITNESSES AND EVIDENCE.

CONDITION.

In partial restraint of alienation of land.—*See ALIENATION OF LAND*.

CONDITION PRECEDENT.

Sale of "Greenbacks"—*Condition precedent to delivery*—*Payment by*

promissory notes—*Tender*—*Waiver after maturity without consideration*—*Evidence*—*Trover*—*Detinue*—*Conversion*.

Defendant agreed to sell to plaintiff certain American currency or "Greenbacks" in four specific sums, amounting in all to \$57,000 of that currency, plaintiff giving him contemporaneously with each transaction his four promissory notes, payable at different times, and for different amounts, in Canadian currency, and also depositing with each of the first two notes, but not with the third, a certain sum of money of the latter currency, while with the fourth he deposited \$400 in American currency, as collateral security, to be returned to plaintiff on payment of that note. Defendant then delivered to plaintiff four of the usual broker's notes, in this form, "Sold to * * deliverable on payment of his note due * * the sum of * * in American currency." After the maturity of the first note plaintiff went to defendant and asked if it was necessary to renew it, when defendant said not, as it drew interest; but, after the remaining notes had fallen due, defendant wrote to plaintiff stating that, his notes being still unpaid, he could not carry the amount of American currency longer and had therefore converted it at that day's rate of exchange, charging his account with the same. Subsequently to this plaintiff several times applied to defendant and his solicitors for the notes, tendering in payment a certain sum of money, which was short by some \$10 or more, and the cheque of one M.; but the solicitors refused to give up the notes, stating that they had been practi-

cally paid (by the conversion of the Greenbacks). It further appeared that plaintiff had drawn out of defendant's hands all his money but the \$400 deposit in Greenbacks.

Plaintiff sued defendant on his agreement to deliver the American currency, alleging his readiness and willingness to pay the notes, but that defendant waived the payment on the days they became due, and that within a reasonable time afterwards and before action he tendered their amount to defendant, who refused to accept it:

Held, that the payment of the notes was a condition precedent to delivery of the "Greenbacks," and that in the absence of any excuse or justification for the non-payment, plaintiff could not recover; that there was no evidence of plaintiff's readiness and willingness to pay according to the terms of the notes, or of sufficient waiver of payment, the alleged waiver at best only applying to one note, and that merely as to time of payment, not the payment itself, and being after the maturity of the note, and without consideration.

Held, also, that the written memoranda and the circumstances of the case shewed that no American currency was collected and set apart for plaintiff under the agreements, so as to pass to him the property in certain known treasury notes or "Greenbacks," and give defendant a lien on them for the amount he was to receive, and that therefore *trover* and *detinue* would not lie for the "Greenbacks;" and that plaintiff could not recover back the deposit of \$400 in Greenbacks," under the count for *trover*, as that had never been demanded, and there was no evidence of actual conversion of it.

Held, also, that *trover* and *detinue* would lie for the four promissory notes, the evidence shewing that they were demanded from defendant and his solicitors, who refused to give them up, though it appeared from defendant's own letter to plaintiff and his contention both at the trial and here that by the conversion of the American currency the notes had been in fact paid. — *Walsh v. Brown*, 60.

CONTINUING COVENANT.

See MEASURE OF DAMAGES, 1.

CONTRACT (ENTIRE.)

See PRINCIPAL AND AGENT.

CONVERSION.

See CONDITION PRECEDENT.

COSTS.

Where pleading adjudged bad on ground not taken by the demurrer, amendment allowed without costs.] — See PLEADING, 2.

See ATTACHMENT OF DEBTS.

COVENANT.

To repair on or before a certain day, a continuing covenant.] — See MEASURE OF DAMAGES, 1. —

Implied — Construction] — See PLEADING, 5.

DAMAGES.

See RAILWAYS AND RAILWAY Cos. 2.

DEED.

By successor of Sheriff, who sold for taxes, good under 27 and 28 Vic. ch. 28 sec. 43.]—See SALE OF LAND FOR TAXES, 2.

DEDICATION (INEFFECTUAL.)

See PUBLIC MARKET.

DELIVERY OF GOODS.

See SALE OF GOODS.

DEPOSIT RECEIPT.

See DONATIO MORTIS CAUSA.

DETINUE.

See CONDITION PRECEDENT.

DEVISE.

In partial restraint of alienation.]—See ALIENATION OF LAND.

DISTRESS.

Purchase of goods under, by landlord, with tenant's consent.]—See LANDLORD AND TENANT, 1.

For rate levied for local improvements.]—See REPLEVIN, 1,

By grantee of Rent Seck.]—See RENT SECK.

See LANDLORD AND TENANT, 1.—PLEADING, 8.

DISTRESS FOR TAXES.

Goods distrained off premises assessed—C. S. U. C. ch. 55—Previous occupant assessed—Liability of future

occupant, though no demand—Pleading.

Held, on demurrer to the plea and avowry set out below, and reversing the judgment of the County Court, that the goods of a future occupant, who took possession of premises after assessment, and was in possession before the return of the collector's roll, were liable to distress for taxes assessed in respect of the premises against the previous occupier; and that a demand upon him before distress was not necessary, as the collector had already made one on the previous occupier, which was all that the Assessment Act required.

Held, also, that the goods were liable to be distrained, though they were not at the time on the property actually assessed.—*Anglin v. Minis*, 170.

See LANDLORD AND TENANT, 4,

DIVISION COURT.

Prohibition—Estoppel—Entitling of affidavits—Adjournment by Division Court Judge of hearing of cause to Chambers—Reading of written judgment by Clerk—Examination of parties under oath.

In an application for a prohibition against the Judge of a Division Court, for an alleged acting without jurisdiction, in a cause before him in that Court, the affidavits upon which the rule *nisi* was granted were entitled, "In the matter of a certain cause in the First Division Court of the Counties of L. & A., in which E. A. M. is plaintiff, and B. D. is defendant:" *Held*, following *Hargreaves v. Hayes*, 5 E. & B. 272, that the entitling of the affidavits in this way was unobjectionable.

A Judge of the Division Court may, under the 86th section of the Division Court Act, *adjourn the hearing of a cause* from a regular sitting of the Court to his Chambers within the territorial limits of the division, and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, *an adjournment of the Court to hear that cause*.

Where a Judge of the Division Court, at the close of the hearing of a cause before him, announced that he would take time to consider, and deliver judgment at his Chambers on a subsequent day, without naming an hour, and before that day sent a written judgment to the Clerk of the Court, who read it in his office to the agents of both parties on that day,

Held, a sufficient delivery of a written judgment within section 106 of the Division Court Act.

A Judge of the Division Court may, under section 102 of the Division Court Act, examine under oath plaintiff or defendant in any cause before him in that Court, although the demand exceed eight dollars.

Held, also, that an applicant for a prohibition against a Judge of the Division Court, for excess of jurisdiction, who has appeared at the trial, cross-examined witnesses, argued the case before the Judge, and taken no exception, at the time, to the jurisdiction, is precluded by his own act from objecting to the jurisdiction after judgment entered and execution issued in the Court below.—*In re Burrowes*, 493.

DONATIO MORTIS CAUSA.

Deposit-receipt for money—Gift inter vivos.

Plaintiff's wife held a Bank deposit receipt for \$1,000. Shortly before her death she directed the trunk containing this receipt to be sent for, or sent for it herself, at the same time expressing her intention of giving the receipt to the wife of defendant, and also delivering to her the key of the trunk. The trunk did not, however, arrive until after her death :

Held, assuming that plaintiff's wife could dispose of the money as if she were sole, that the instrument, not having been actually delivered by the donor before her death, did not pass to the defendant's wife as a *donatio mortis causâ*.

Held, also, that even if there had been an actual gift of the deposit receipt, with the intention of passing to the defendant's wife the money mentioned in it, as a gift *inter vivos*, and she had accepted it, though there was no actual delivery, the gift, being a mere chose in action, would not pass as a mere gift *inter vivos*.—*McCabe, Administrator, v. Robertson, et al.*, 471.

EJECTMENT.

Ejectment—Title.

Evidence that plaintiff had been in possession of the land and had been intruded upon by defendant, *Held*, insufficient to entitle plaintiff to succeed in ejectment, it appearing that the fee was still in the Crown, the plaintiff being in possession as a free grant settler, but without patent or license of occupation.—*Henderson v. Morrison*, 221.

See ALIENATION OF LAND.

ENCUMBRANCES.

Condition as to in Fire Policy.—
See INSURANCE, 2.

ENTIRE CONTRACT.

See PRINCIPAL AND AGENT.

ESTOPPEL.

Of applicant for Prohibition.—
See DIVISION COURT.

EVIDENCE.

Marine insurance—Unseaworthiness—Evidence.

In a policy of insurance on a vessel belonging to plaintiff, insuring only against perils of the sea, one of the conditions was that the defendants were not to be liable for loss or damage arising from unseaworthiness. The vessel in question, some fifteen minutes after she had left port, began to leak, and in about five hours went down. Both weather and water, it appeared, were at the time perfectly calm, and no actively adverse cause could be or was assigned for the accident, nor was any evidence given by plaintiff to rebut the presumption, which, it was contended, therefore arose, that the loss was not occasioned by perils of the sea :

Held, that plaintiff was bound to have given this evidence, and that the absence of it disentitled him to recover.—*Coons v. The Aetna Insurance Company*, 305.

EVIDENCE.

Rejection of.—See INSURANCE, 1.

That free grant settler, without patent or license of occupation, had been in possession and been intruded upon by defendant, insufficient in in Ejectment]—See EJECTMENT.

In interpleader issue between official assignee and execution creditor, latter not bound to prove judgment and execution]—See INSOLVENCY, 2.

See CONDITION PRECEDENT.

“ RAILWAY AND RAILWAY COS. 1.

“ PARENT AND CHILD.

“ MARINE INSURANCE.

EXAMINATION.

Of parties to suit, under oath, by Division Court Judge]—See DIVISION COURT.

EXCESSIVE DAMAGES.

See WITNESSES AND EVIDENCE.

EXECUTION.

Priority over attachment]—See INSOLVENCY, 1.

Priority over voluntary assignment in favor of creditors]—See INSOLVENCY, 2.

EXECUTOR.

Debt due by garnishee in representative character, attachable]—See ATTACHMENT OF DEBTS.

FALSE SWEARING.

See INSURANCE, 2.

FIRE POLICY.

See INSURANCE, 1, 2.

FUTURE OCUPANT.

Of premises assessed against previous occupant, liable to distress for taxes.]—See DISTRESS FOR TAXES.

GARNISHMENT PROCEEDINGS.

Nature of indebtedness of garnishee must be stated.]—See ATTACHMENT OF DEBTS.

Affidavit must be made by Attorney.]—Ib.

GENERAL ISSUE (BY STATUTE.)

See RENT SECK.

GIFT INTER VIVOS.

See DONATIO MORTIS CAUSA.

GOODS.

Measure of damages for non-delivery, where no notice of necessity for prompt delivery.]—See MEASURE OF DAMAGES, 2.

Liable to distress for taxes, though not on premises assessed.]—See DISTRESS FOR TAXES.

GREENBACKS.

Sale of.]—See CONDITION PRECEDENT.

HIGHWAY.

User of portion of Market as.]—See PUBLIC MARKET.

IMPLIED COVENANT.

Construction of.]—See PLEADING, 5.

INCORPORATED CO.,

Pro-note signed by President of.] See BILLS OF EXCHANGE AND PROMISSORY NOTES.

INCREASE OF RISK.

In property insured.]—See WAREHOUSE RECEIPT.

INSOLVENCY.

1. *Appeal—Assignment not in accordance with Act of 1864—Execution—Attachment—Interpleader—Priority.*

Certain debtors executed a deed of assignment for payment of creditors, but not in accordance with the Insolvent Act of 1864. The defendant, subsequently to this deed, issued a writ of execution against the debtors, and then took proceedings in insolvency, under the Act of 1864, against their estate, for the general benefit of creditors :

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 445, that the assignment was an act of bankruptcy and void, and could not be set up, on the issue joined, for any purpose, and that, therefore, the defendant, the execution plaintiff, though petitioner in insolvency, could, notwithstanding his proceedings in insolvency, founded on his judgment at law and the assignment, enforce his execution against the debtor's estate, to the postponement of the rest of the creditors : *Hagarty, J., A. Wilson, J., and Mowat, V. C., dissenting.*

Semle, that on application to the proper Court, defendant might have been restrained from asserting any right under the execution at law.—*Thorne v. Torrance, 29.*

2. *Assignment to non-resident assignee—Ratification—Execution—Priority—Evidence.*

Held, following *Hingston v. Campbell*, 2 U. C. L. J. N. S. 299, and *Whyte v. Cuthbertson*, 17 C. P. 377, that a voluntary assignment to an official assignee must be to one resident in the county within which the insolvent has his place of business; but, *Semble*, that the creditors may acquiesce in an assignment to a non-resident official assignee, and thus constitute him their assignee.

In this case, the defendant's execution was placed in the Sheriff's hands on the 28th June, the assignment made on the 16th July, and the meeting of creditors, at which defendant attended, by his attorney, who examined the insolvent and did not object to the assignment, and at which it was agreed to discharge the insolvent, was held on 28th August following:

Held, that even if the creditors had adopted plaintiff as their assignee, which it did not appear they had, such adoption would not have divested defendant of his rights under the execution, as their ratification of the assignment related back only to the date of the meeting of creditors, not to that of the assignment itself.

Per A. Wilson, J., that the assignment might have been set aside by the Judge in insolvency, at the instance of any of the creditors, and *Semble*, that this was the only and proper remedy, and that from such a decision an appeal might be maintained.

Held, also, that defendant was not required, in the interpleader issue between himself and the assignee, to prove his judgment and

execution. — *McWhirter v. Learmouth*, 136.

3. *Debt not matured—Right of creditor to commence proceedings.*

Under the Insolvent Acts of this Province a creditor, whose debt is immatured, may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time. But, in this case, it appearing that the debtor did not owe more than \$100 beyond the creditor's debt, none of which was at the time due, and a portion not payable for several years to come, the Court directed that he should be allowed further time to shew, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation. — *In re Moore v. Luce*, 446.

INSURABLE INTEREST.

See PLEADING, 3.

“WAREHOUSE RECEIPT.

INSURANCE.

1. *Misrepresentation — “Owner,” meaning of — Misdirection—Rejection of evidence—New trial.*

One of the conditions of a fire policy, was that the application, with the survey and diagram of the premises, should form part of the insurance contract; and there was a proviso, in the shape of a covenant on the part of the assured, that the representation given in the application contained a just, full and true exposition of all facts, &c., and the interest of the insured therein, so far as same were known to the

assured, and that if any *material fact* should not be *fairly represented* the policy should be void.

In the application plaintiff described the subject of insurance as "all the property of the assured," and to one of the enquiries therein contained, whether he was owner, mortgagee or lessee, he replied "owner."

The property in question consisted of two buildings belonging to plaintiff, though it appeared that the land on which they stood was *leasehold*.

Defendants, among other pleas, in effect pleaded that plaintiff in his application had misrepresented the facts connected with the property, and especially as regarded his title thereto, having described himself as owner, whereas he was merely lessee.

At the trial plaintiff tendered the evidence of the owner of an adjoining building, to shew that he (witness) had told defendants' agent how the buildings were situated, and that the agent knew the position of all to be the same; but this evidence was rejected, as contradicting plaintiff's own written statement, and the jury were directed to find for defendants on the above plea, the learned Judge refusing to leave to them the question of misrepresentation on plaintiff's part:

Held, that this direction was wrong; that the word "owner," having no definite meaning in law, but being applicable to various interests which parties have in buildings, if plaintiff used it in good faith he ought not to suffer, and the question whether he fairly represented the facts regarding the risk should have been left to the jury,

Held, also, that in order fairly to judge of the answers of plaintiff, evidence might be given of the surrounding facts as to the ownership of the building and of the land; and that, to establish the *bona fides* of plaintiff's answer, he might shew that defendants' agent, who drew up his statement, had been informed by plaintiff, or some one else to plaintiff's knowledge, of the state of the title to the premises. A new trial was, therefore, granted without costs.—*Hopkins v. Provincial Insurance Company*, 74.

2. *Appeal — Fire policy — Condition as to incumbrances — Vendor's lien — False swearing.*

One of the conditions of a Policy of Insurance was that every incumbrance affecting the property at the time of assurance, must be mentioned in the application, otherwise the policy should be void. The property in question had been conveyed to the plaintiff and his wife by one S. and wife, in consideration, as expressed in the deed, of a then subsisting indebtedness by S. and wife to plaintiff, and of a bond by plaintiff *alone* to support S. and wife during their lives, who by the said deed *released to plaintiff and wife all their claims upon the property*. In his application for assurance plaintiff stated the property to be unincumbered:

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 493, that there was no lien for purchase money, and that the property was not encumbered.

Another condition of the Policy was that any fraud or attempt at fraud, or false swearing, on the part of the assured, should cause a forfeiture of all claims under the

Policy. After the loss by fire plaintiff made a statement under oath, that he was absolute owner of the property at the time of the fire, whereas, under the conveyance to him and his wife, he was only jointly interested with her therein :

Held, reversing the above judgment, *J. Wilson, J. dissentiente*, that he was not guilty of false swearing within the meaning of the condition ; for that the word "false", as used there, meant wilfully and fraudulently false (of which defendants had themselves at the trial acquitted plaintiff), whereas it was merely an incorrect description of of his title with which he could be charged.

Remarks upon the equitable doctrine of the vendor's lien for unpaid purchase money.—*Mason, (Plaintiff in Court below) Appellant, v. The Agricultural Mutual Assurance Association of Canada (Defendants in Court below) Respondents*, 19.

See WAREHOUSE RECEIPT.

" MARINE INSURANCE.

INTERPLEADER.

See LANDLORD AND TENANT, 1.

" INSOLVENCY, 1, 2.

JUDGMENT.

Action on.—See PLEADING, 4.

LANDLORD AND TENANT.

1. *Distress*—*Purchase by landlord*—*Execution against tenant*—*Interpleader*—*C. S. U. C. ch. 45, sec. 4.*

Plaintiff distrained upon his tenant, and at the sale, *with the latter's consent*, purchased portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant, and partly by the delivery of the tenant to him ;

Held, reversing the judgment of the County Court, that though the general principle there laid down is correct, that no one can sustain the double character of seller and buyer, yet that where, as in this case, the tenant consents to the purchase by the landlord, there the sale can be supported ; and therefore in this case, *Held*, that the property sold passed to the plaintiff, and that he could hold it against defendant's execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual and continued change of possession, under *C. S. U. C. ch. 45, sec. 4*—*Woods v. Rankin*, 44.

2. *Rent payable in advance*—*Agreement to purchase demised premises*—*Cancellation of lease*—*Satisfaction of rent by payment of purchase money.*

By an indorsement under seal upon a lease of premises it was agreed between landlord and tenant that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased ; but that, if the agreement became void by reason of the non-fulfilment of its terms before or at the time of payment of the second instalment, the lease was to be and remain in full force and effect ; and in case of the lease being cancelled, no rent to be paid after 3rd February, 1863, the date

of the agreement to purchase. Under the lease the rent was payable in advance, and at the date of the agreement to purchase a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid under the agreement, and the interest also, according to the tenant's evidence, but according to the landlord's, it was not paid at the time, though he admitted that he had agreed to allow it to stand for some months afterwards :

Held, that by the memorandum under seal indorsed on the lease the rent under it, payable in advance, was not to be paid in case the lease was cancelled, and that the deed was cancelled, in accordance with the agreement, by the payment of the second instalment of purchase money, even supposing the interest not to have been paid, for the landlord admitted he had waived its payment at the day, by suspending it to a future time ; and therefore *Held*, that the landlord could not recover the quarter's rent which fell due on 1st February, as this was either satisfied by the agreement and payment of money on the 3rd February, when the first instalment was paid, or to be considered by the endorsement under seal on the lease as abandoned, with all other rent, whether accruing due before or afterwards.—*Forge v. Reynolds et al.*, 110.

3. *Lease and sub-lease—Cancellation of lease—Merger—Con. Stat. U. C. ch. 90, sec. 7—Distress—Trespass.*

One I. leased certain premises for a term of years to B., who sublet portion of them to plaintiff.

Afterwards, by endorsement on the lease from I. to B., after recit-

ing that they had mutually agreed to release each the other from the covenants and agreements contained therein, it was declared that said lease was therefore wholly cancelled at and from that date, and B. authorized I. to collect the rent under the lease from him to plaintiff. Subsequently, I. distrained upon plaintiff for two quarter's rent under B's lease to him.

At the time of the distress plaintiff had paid all rent then due for one quarter, being the first distrained for, to one C., under an agreement with B., so to do, with the exception of a small amount still unpaid. There was a second distress for the other quarter, the time of payment of both quarters having elapsed ; and there was also in arrear at this time six month's rent under the lease from I. to B. Plaintiff, thereupon brought trespass against I. : *Held*, that the action must fail ; first, that as the term created by the lease from I. to B. continued to exist notwithstanding the cancellation of the lease, the rent which was incident to that term could be distrained for : that that rent being unpaid, might be set up in this action of trespass, as shewing defendants had a right to take the goods, being on the demised premises, as a distress for the rent due, just as they might have avowed for it, had the action been replevin ; secondly, the rent being due, under the lease from B. to plaintiff, and B. having authorized I. to collect and receive it, defendants might set that up under the facts shewn, as justifying the distress.

Held, also, that if the cancelling of the lease by I. and B. merged the term created by it, the right of I. to distrain was preserved by Con.

Stats. U. C. ch 90, sec. 7.—*Laur v. White et al.*, 99.

4. *Landlord and tenant—Assignment of lease not under seal—Taxes—Distress—Beasts of the plough—Acquiescence of tenant.*

The defendant, owner in fee, conveyed to E. D. and took back mortgage. E. D. then leased to plaintiff, and afterwards, by writing, without deed, assigned lease to defendant. A dispute having arisen whether tenant or landlord should pay taxes, the lease being silent as to this, defendant distrained, and plaintiff replevied. The Judge left it to the jury to say whether the plaintiff had attorned to defendant, and they found in the negative.

On motion for a new trial, *Held*, that there could be no assignment without deed, and as the question of tenancy was raised by the pleadings, plaintiff must succeed, for he was not tenant by assignment, nor, as the jury had found, by attornment.

Held, also, that the landlord should pay the taxes, as the lease contained no provision as to them; and that as to the issue raised respecting beasts of the plough distrained, the tenant had acquiesced.—*Dove v. Dove*, 424.

See MEASURE OF DAMAGES, 1.

“ PLEADING, 8.

LEASE OF LAND.

Assignment of, not under Seal.]—
See LANDLORD AND TENANT, 4.

See LANDLORD AND TENANT, 3.
PLEADING, 8.

LIBEL.

See PLEADING, 6.

LICENSEES OF TIMBER LIMITS.

Right to cut timber on road allowances.]—See TIMBER LIMITS.

LOCAL IMPROVEMENTS.

See REPLEVIN, 1.

MALICIOUS ARREST.

Pleading.

The plaintiff declared against the defendants for malicious arrest, in the form prescribed by C. S. U. C. ch. 22, schedule B, No. 27:

Held, sufficient.

Held, also, that it was not necessary for plaintiff to shew that the action, in which the arrest took place, was at an end, or that he had been discharged from the arrest, and the order of the Judge under which it had been made set aside.—*Eakins v. Christopher*, 532.

MARINE INSURANCE.

Marine insurance—Total loss—Evidence—Notice of abandonment—New trial.

In marine insurance notice of abandonment is indispensably necessary in all cases where the insured elects to abandon.

In this case the vessel insured ran upon the rocks on the 11th October, and the defendants' agent was informed of it by the insured on the 16th October, but he was not informed of his abandonment as for a total loss until he made the protest before the agent on the 17th October, and no formal abandonment in writing, under the terms of the policy, was made

until 27th December following, when the vessel had been floated off and utterly lost by the carelessness of the insured: *Held*, that the notice was too late to be available, even if there had been such a loss as would have entitled the insured to abandon.

Whether a loss is to be considered a total loss depends on the fact whether the vessel, as injured, is useless to the owner unless at an expense that no prudent man, if uninsured, would incur, an expense exceeding the value of the ship when repaired. In this case it appeared that on the ninth day after the vessel went upon the rocks, the captain, on returning to her, found her in as good a state as on the second day, and that she remained between two and three weeks on the rocks, and then floated two or three miles below. It further appeared that there was not the slightest attempt made to get her off or recover her, or even to examine her, while all the witnesses said they would have tried to get her off, and it seemed beyond doubt they were eight days during which from the calm state of the water an attempt could have been successfully made, for within three days after she first ran on she floated again without any assistance, and there was evidence that even one man could have hauled her off, but the captain, a witness stated, intimated to him that he did not mean to do anything with the vessel:

Held, that the evidence wholly disproved a total loss, either actual or constructive.

Held, also, that the fact of the plaintiff not having made any exertion to get the vessel off was no

ground for a new trial, as, if the vessel got on the rocks by perils of the sea and was injured, plaintiff was entitled to be indemnified for that; but that he was not obliged to take her off, but might leave her on the rocks until she went to pieces, though he could not recover for the destruction thus voluntarily suffered.—*Harkley v. The Provincial Insurance Co.*, 335.

See EVIDENCE.

MARKET.

See PUBLIC MARKET.

MARRIED WOMAN.

Certificate on married woman's deed—1 *Wm. IV.*, ch. 3—2 *Vic. ch.* 6—*C. S. U. C. ch.* 35, sec. 13.

The certificate on a married woman's deed was in these words, I. A., Judge of the * * do hereby certify that on this 13th day of January, 1849, at * in the said * * the within deed was duly executed in the presence of M. of * merchant, and D., of * merchant by the within named Margaret, wife of L., within named, and that the said Margaret, at the said time and place, being examined by me apart from her husband, did appear to give her consent, &c., &c."

Held, that as the Judge could not have certified that the deed was executed in the presence of the witnesses who subscribed it, without being himself present, and as, when he certified to her consent to depart with her estate at the time of the execution of the deed, he was unquestionably certifying to a fact of which he had been a witness, and on the presumption

that he knew the law and did his duty, the inference was that the certificate was executed in his presence, as required by 1 Wm. IV., ch. 3, and 2 Vic. ch. 6, under which it was given; but, if the certificate was defective in form, effect must be given to it under C. S. U. C. ch. 35, sec. 13, as it had been made before 4th May, 1849.—*The Commercial Bank of Canada v. Smith et al.*, 214.

MEASURE OF DAMAGES.

1. *Tenant to repair—Lessee against lessor—Continuing covenant—Measure of damages.*

In an action by lessor against lessee for breach of a covenant to repair fences, on or before a certain day, *Held*, 1st. That such a covenant is not a continuing covenant, and damages must therefore be assessed once for all. 2nd. The proper measure of damages in such a case is, the amount by which the beneficial occupation of the premises during the term is lessened.

Whether the cost of repairing would also be a correct method of estimating the damages must depend upon the circumstances of each case.

Semble, If the cost of repairing would be so large as to be out of proportion to the tenant's interest in the premises, he would not be justified in repairing and treating the costs of such repairs as his damages.—*Cole v. Buckle*, 286.

2 *Carriage of goods—Want of notice of necessity for prompt delivery—Breach of contract—Measure of damages.*

In an action by plaintiffs against

defendants for damages occasioned by the non-delivery of a certain article of machinery contracted to be delivered by them for plaintiffs, it appeared that no notice had been given at the time of the contract to the defendants of the necessity for a prompt delivery of the machinery, nor of the use it was to be put to:

Held, on the authority of *Cory v. The Thames Iron Works Co., L. R. 3 Q. B. 181*, re-affirming *Hadley v. Baxendale*, 9 Ex. 341, that the plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from this non-delivery, or the wages of certain workmen employed upon the building in which the machinery was to be used.—*The Ruthven Woollen Manufacturing Co. v. Great Western Railway Co.*, 316.

See PLEADING, 2.

MEMORANDUM IN WRITING.

See SALE OF GOODS.

MERGER.

Action on bills of exchange—Mortgage as collateral security—Merger—Pleading.

To an action on bills of exchange defendant pleaded that E., another party to the bills, had given plaintiffs a mortgage containing a covenant to pay the amount of the bills, and that the remedy on the bills was merged in the higher security:

Held, that the mortgage being expressed to have been given as "further security," and there being a provision that it should stand as security for any renewal of the bills, the mortgage was collateral

and did not merge the remedy on the simple contract.

Held, also, that the remedy on the specialty and on the simple contract, not being *co-extensive* or between the same parties, the doctrine of merger did not apply.—*Gore Bank v. McWhirter*, 293.

Of term created by lease.]—See LANDLORD AND TENANT, 3.

MISDIRECTION.

See INSURANCE, 1.

MISREPRESENTATION.

See INSURANCE, 1.

MORTGAGE.

As collateral security.]—See MERGER.

NEGLIGENCE.

See RAILWAYS AND RAILWAY COS. 1.

NEW TRIAL.

On payment of costs—meaning.]—See PRACTICE.

“ INSURANCE, 1.

“ RAILWAYS AND RAILWAY COS. 1.

“ MARINE INSURANCE.

NEW TRIAL REFUSED.

Port Hope, Lindsay and Beaverton Railway Company—Contract by Directors individually—Company not bound—New trial refused.

Plaintiffs sued defendants for

breach of an agreement to carry lumber for them from Peterborough to Port Hope at a stipulated price. The agreement set out, which was dated in November, 1865, recited that defendants were engaged in running the “Port Hope, Lindsay and Beaverton Railway” and the Millbrook Branch thereof, and by it defendants bound themselves to carry plaintiffs’ lumber at a certain rate.

Defendants pleaded that the agreement was made by them as agents and directors of the Railway Company, of which plaintiffs had notice, and that by the 16 Vic., further amending the Act incorporating the Peterborough and Port Hope Railway Company, among other clauses of the “Railway Clauses Consolidation Act,” was adopted a clause enacting, in substance, that no undue advantage, privilege, or monopoly should be afforded to any person, which said clause was contained in ch. 66 of Consol. Stat. C., entitled “An Act respecting Railways;” and that by the 18 Vic. the name of the “Peterborough and Port Hope Railway Company” was changed to “The Port Hope, Lindsay and Beaverton Railway Company”; that after the making of said agreement the rates of carriage were increased beyond those mentioned therein, and that the Company made no other charge against plaintiffs than against every one else. *Lx V*

It appeared at the trial that defendants were, at the date of the agreement, one President, and the other Managing Director of the main line of Railway from Port Hope to Lindsay, and lessees of the branch line leading from Millbrook, a station on the main line, to

Peterborough'; that by reason of the Company having been long insolvent the main line had been solely within defendants' control, as principal bondholders of the Company; and that what they did personally was in substance, therefore, done on the Company's behalf. The jury were asked to find whether the agreement was made by defendants acting as agents for and Directors of the Company, of which plaintiffs had notice, and having found in the negative and assessed damages in favour of plaintiffs, the Court refused to interfere with their verdict, as contrary to law and evidence, by granting a new trial.—*McDougall et al. v. Covert et al.*, 119.

See MARINE INSURANCE.

“ BILLS OF EXCHANGE AND PROMISSORY NOTES.

NON-RESIDENT LAND.

See SALE OF LAND FOR TAXES, 2.

NOTICE OF TRIAL.

Cannot be given before costs paid, where new trial granted on payment of costs.]—See PRACTICE.

PARENT AND CHILD.

Liability of parent for child's indebtedness.

Plaintiff, upon their order, furnished to several of defendant's sons, who were at the time living with their father, certain articles of wearing apparel, charging the same to defendant, and delivering them at his house. Previously to this defendant had caused to be inserted once, in one of the daily papers

published in the place and taken in by the person by whom plaintiff was employed, a notice to the effect that he would not be responsible for any debt contracted in his name from that date without his written order, but after the goods in question had been furnished to his sons he wrote to the plaintiff stating that he would not in any way be responsible for any debt incurred by any of his sons *from and after that date*, unless under his written order :

Held, that in the absence of evidence repelling the presumption of defendant's authority to his sons to contract the liability in his name, the fact of delivery of the articles at defendant's house for his sons and the language of his letter to plaintiff were quite sufficient to justify the jury in finding defendant liable, and that it was not necessary to go further and prove the infancy of the sons.—*Hayman v. Heward*, 353.

PLEADING.

1. *Common Schools*—C. S. U. C. ch. 64, secs. 50, 51, 57, & 91, sub sec. 2.—*Pleading*.

Declaration by a school teacher against defendant, as sub-treasurer of school moneys, setting out an order signed by the *local superintendent* of schools in favour of plaintiff upon defendant, as such sub-treasurer, directing him to pay plaintiff \$27.80, and charge to account of *county assessment* for 1866, and alleging a refusal by defendant to pay plaintiff in pursuance of such order, with a claim for a mandamus and £50 damages :

Held, on demurrer, declaration bad, as not shewing that the check

or order was drawn on the order of the school trustees, and in setting out a check void on its face, because drawn upon a fund over which the local superintendent had no control, and in not shewing that the sub-treasurer had money in his hands belonging to the school section, or that the county council had made provision to enable him to pay the amount.—*Welsh v. Leahy*, 48.

2. *Agreement—Proviso—Cesser of obligation—Want of notice to obligee Pleading—Measure of damages—Amendment—Costs.*

By an agreement under seal between plaintiff and defendant, and under the 4th clause thereof, defendant agreed with plaintiff to continue to run his vessel between two ports named, for the period of six weeks, and at the time of the agreement plaintiff paid defendant \$2000, which the latter was to retain, subject to his continuing to run the vessel between such ports for the said period of six weeks, and up to the 27th July then next, at his own risk and for his own benefit, and for a further period named, provided that during the six weeks the gross earnings of the vessel should not be less than \$75 per running day, with the same proviso as to the further period; and provided, also, that upon plaintiff's paying up any deficiency in said rate of \$75, at his option, he might require said vessel to continue her running during said period. On the expiration of the first week defendant ceased running his vessel, and to an action at plaintiff's suit for breach of his agreement, which was set out *verbatim* in the declaration, defendant pleaded that the agreement on his part to run the vessel

during the period mentioned was subject to the proviso above stated, as to the \$75 per day, averring that on or before the expiration of the first week that amount was not realized, and therefore on that day he discontinued the running:

Held, on demurrer to this plea, that the construction of the agreement was not that defendant was obliged to run the vessel for the six weeks unconditionally, and whether she realized the \$75 per running day or not, but that it was subject to the proviso that that amount should be realized, and that therefore the plea was not bad on this ground; but that it was bad as not shewing that defendant had notified plaintiff of the deficiency, so as to have allowed him to make it up, if he desired so to do, and insist upon the vessel's continuing her trips for the specified period under the agreement. But, *Held*, that as it was probable plaintiff had in fact notice of the stoppage of the vessel, defendant should be allowed to amend his plea in this respect, on filing an affidavit to that effect, and without being obliged to pay the costs of the argument of the demurrer, as neither party had raised the point, but on payment of the costs of the day of the trial, which had previously taken place, and at which a verdict was entered for plaintiff for 1s. damages, subject to the opinion of the Court whether it should be increased to such a proportion of the \$2000 as would represent the five weeks which the vessel had not completed under the agreement; and as to which, *Held*, that the measure of damages which the plaintiff was entitled to recover, for the non-fulfilment of the agreement, was such proportion, being five-sixths of the \$2000, and that

he was not obliged to prove his damage, as this was fixed by the agreement in question.—*Thompson v. Leach*, 141.

3. *Insurable interest*—29 Vic. ch. 28, sec. 7.—*Pleading*.

Averment in declaration that at the time of the loss a mortgagee of the plaintiff was entitled to the benefit of a covenant in a mortgage, made by plaintiff before the making of the policy, to insure the property, and that the plaintiff sued as well for the benefit and on behalf of the mortgagee as on the plaintiff's own behalf, *Held*, not to vitiate the declaration.

Plea, that after the policy and before the fire plaintiff sold and conveyed all his interest in the property to a stranger, and that at the time of the loss the plaintiff had no interest in the property either on his own behalf or on behalf of the mortgagee in the declaration mentioned, *Held*, a good answer to the declaration.

Replication, on equitable grounds, that the alleged conveyance was only by way of mortgage and that plaintiff had a right to redeem, *Held*, a good answer to the plea, and no departure.

Quære, as to the effect of 29 Vic. ch. 28, sec. 7.—*Smith v. Provincial Insurance Company*, 1223.

4. *Action on judgment*—*Plea of judgment recovered against, and payment by, co-surety*—*Pleading*.

To a declaration on a judgment recovered against defendant in the Court of Queen's Bench for damages and costs, defendant pleaded that the judgment was recovered upon a promissory note made by defendant, payable to the order of

one Scott, who endorsed to one Scanlon, who endorsed and delivered to plaintiffs, who became and were the holders at the time of the recovery of said judgment: that defendant made the note, and Scanlon endorsed, for Scott's accommodation, and as his surety, to secure a debt due from him to plaintiffs, and that when the note was made, endorsed and delivered, it was agreed between defendant, Scott, Scanlon and plaintiffs, that defendant and Scanlon should be liable thereon to plaintiffs as sureties for Scott, and that except as aforesaid there was no value or consideration for the making, indorsing or payment of the note by defendant or Scanlon; that Scott having made default in payment of his debt, plaintiffs sued Scanlon as endorser, and recovered judgment against him, being the same debt for which the judgment declared upon in this action was recovered, and Scanlon afterwards and before action satisfied the amount of the said judgment and costs by payment to plaintiffs, and therewith and thereby paid and satisfied plaintiff's claim in respect of the cause of action in the introductory part of the plea mentioned: *Held*, on demurrer, a bad plea.—*The Bank of Upper Canada v. Mercer*, 300.

5. *Implied covenant*—*Construction*—*Pleading*.

The declaration stated that the defendants covenanted with the plaintiffs that the plaintiffs should make them advances either in money or wool; that the defendants would buy wool with moneys advanced; that the plaintiffs should have a lien on all the wool, and might insure it and charge the premium as advances; that the wool,

as manufactured, should be assigned to the plaintiffs for sale; that the plaintiffs should be entitled to $1\frac{1}{2}$ per cent. commission, on advances, and 5 per cent. on sales, and that plaintiff should carry proceeds of sales to defendant's credit, after deducting the advances on commission; Averment, that plaintiffs made advances, paid insurances and made sales, and credited defendants with the proceeds, less the advances and commission to which plaintiff became entitled, in addition to the balances due to them for advances and interest, to large sums for commission under the agreement, and that upon the closing of the agreement there was due to the plaintiffs a large sum, as the balance due thereunder: Breach, that the defendants had not paid.

Held, on demurrer.—1st, That upon the sale of all the goods delivered by the defendants to the plaintiff, an action might lie on the covenant for any balance due to the plaintiffs for advances and commission, as a liability to be implied from the tenor of the agreement.

2nd, That the expression "upon the closing of the agreement," was not equivalent to an averment that plaintiffs had no goods of the defendant still on hand to be sold, and that the declaration was therefore insufficient.—*Young et al. v. Crossland, et al.* 312.

6. *Libel—Justification—Reversal of conviction before the alleged imprisonment—Pleading.*

The declaration was for libelling the plaintiff, in the defendants newspaper, in the following words, "Old S., who was naturalized by serving a term in the penitentiary of New York State," charg-

ing the meaning to be, that the plaintiff had served a term, as a convict, in said prison. The defendants pleaded in justification, by setting up a conviction of the plaintiff of an indictable offence before the Recorder's Court in Buffalo, prior to the publication of the libel, his sentence and condemnation to imprisonment in the State prison of New York State for the term of two years, and his subsequent committal to that prison and detention there for that period.

Replication, that within three months from the time of the alleged conviction, and before the plaintiff was imprisoned for the said term in said State prison, the conviction was reversed by the Supreme Court of the State of New York, and the plaintiff released from custody upon the charge against him.

Held, on demurrer, replication good.—*Davis v. Stewart et al.*, 482.

7. *Seduction—Agreement to support child—Pleading.*

Declaration in seduction, by the father.

Plea, in effect, that after the seduction it was agreed between plaintiff and defendant that if defendant would agree to take, maintain, and support the child at his own costs, &c., from the date of such agreement, plaintiff would accept the same in full satisfaction and discharge; and that defendant, in pursuance thereof, did agree so to do, and plaintiff accepted said agreement in full satisfaction, &c.

Replication, that before said agreement was made the mother of the child made the usual statutory affidavit, and filed it within

the required time, and before the alleged accord, in the office of the Clerk of the Peace, and that defendant, before and at the time of the making of such alleged agreement and accord, was liable in law to maintain and support the child:

Held, on demurrer, plea good, as setting out an agreement on defendant's part, for which a sufficient consideration appeared in his undertaking a liability which he was not bound to assume, and that defendant was not obliged to shew that he had actually performed his agreement, as this was unnecessary to support the accord set up by the plea.

Held, also, that the replication was bad, and did not displace the plea.—*McHugh v. Gear*, 488.

8. *Replevin—Lease—Construction as to time of payment of rent—Distress—Pleading.*

In replevin defendant avowed justifying under a distress for \$140 rent, due 1st May 1867, under an indenture of lease, by which defendant demised to plaintiff for five years, to be computed from 15th March, 1867, at the yearly rent of \$280, payable 1st November and May during the term, excepting the last payment, which was to be paid on the 15th March preceding the 1st May.

Plaintiff pleaded, setting out the indenture in full, and alleged that only one instalment of rent had become due before action, which he paid defendant before distress.

Defendant replied that there were two instalments due before distress, on 1st May and November, 1867, and not one only as alleged :

Held, on demurrer, replication bad.—*Brown v. McCarthy*, 454.

See DISTRESS FOR TAXES.

“ MERGER.

“ MALICIOUS ARREST.

PERVERSE VERDICT.

Definition of—See WARE-HOUSE RECEIPT.

PORT HOPE, LINDSAY AND BEAVERTON R. CO.

See NEW TRIAL REFUSED.

PRACTICE.

New trial on payment of costs—Notice of trial before payment—Verdict set aside—Practice.

Where a new trial is granted to a plaintiff on payment of costs, the payment of the costs is a condition precedent to the right to give notice of trial. In this case, therefore, where plaintiff gave notice of trial before the costs were taxed and paid, though he had offered defendant's attorney to pay them at once and without taxation, on his stating the amount, which the latter at first agreed, but immediately afterwards declined, to do, apparently with the object of throwing plaintiff over the Assizes, then near at hand, notwithstanding the costs were within three days afterwards taxed and paid, the Court set aside the verdict, but under the circumstances without costs.

The duty of the attorney in such a case is to deliver a bill of his costs as requested, where he makes no objection of want of time, or inability to deliver it, and to receive

payment without insisting on an official taxation.—*Stock v. Shewan*, 185.

See SECOND APPLICATION.

“ DIVISION COURT.

PRINCIPAL AND AGENT.

Excess of authority—Entire contract—Principal not bound.

Defendant's agent, having without authority contracted in writing to sell to plaintiffs all the pine timber on certain lands belonging to defendant, both the standing timber and that cut after a date named, as to the latter of which his authority was undisputed, received from plaintiff \$75 on account of the agreement, with the private and verbal understanding, that in case defendant's claim to logs cut before the date referred to could not be sustained, as turned out to be the case, the \$75 should be returned. It appeared that as soon as defendant was informed of the sale by her agent of the standing timber to plaintiff, she at once repudiated it, and in fact that plaintiffs had been aware, when they entered into the agreement, that the agent had no authority to sell it. In an action against defendant to recover back the \$75 paid to her agent, which the latter retained in his hands, *Held*, that the contract was an entire one, and that plaintiffs could not recover against defendant, but that their remedy, if any, was against the agent.—*Strickland et al v. Vansittart*, 463.

PRIORITY.

Of execution over attachment.—See INSOLVENCY, 1.

Of execution over voluntary assignment in favor of creditors.—See INSOLVENCY, 2.

PROHIBITION.

Sufficiency of entitling of affidavits in application for.—See DIVISION COURT.

PROMISSORY NOTES.

Signed by President of Incorporated Co.—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC MARKET.

Trespass—Land conveyed to Corporation as a market—User by public as a highway—Ineffectual dedication.

A block of land in the city of Hamilton, extending from John Street to Hughson Street, was conveyed to the corporation for the purposes of a public market, a strip across the entire northerly side of which had been used for over twenty years as a passage-way or sidewalk; but this strip was not separated from the rest of the block except by a kind of ditch, the earth from which mainly formed the sidewalk and raised it above the level of the rest of the block. This sidewalk had been recently narrowed and planked like the ordinary sidewalks of the city. A public market building had been erected on the southerly part of the block and used as such for about thirty years. The defendant and others, who owned the land adjoining to the sidewalk on the north, had erected buildings thereon fronting or facing on the sidewalk and nearest block, which buildings were generally oc-

cupied as taverns, and to some of which there was no access except across the sidewalks. The city authorities, for some unexplained reasons, had recently erected a close board fence on the extreme northerly boundary of the sidewalk from street to street, thus effectually obstructing the doors and windows of said buildings, and cutting off all access to one or more of them. The defendant, being one of those injuriously affected by the board fence, cut it away, contending that he had a right to enter upon the sidewalk from any part of his land adjoining to it, as long, at any rate, as it was permitted to be used as a public way either for carriages or foot passengers, and in trespass for cutting away the fence he pleaded several pleas, alleging the *locus in quo*, in some, to be a carriageway, and in others a footway, relying on the public user for over twenty years:

Held, that the city authorities, being in the position of trustees, were incapable of dedicating any part of the land to the purposes of a highway, or of diverting it in any respect from its original purpose of a public market, and therefore no such dedication could be presumed from any length of user they might permit or had permitted; and that, acting on behalf of the public, from the nature of their trust, they necessarily retained such a power of control as would justify the erection of the fence in question.—*The City of Hamilton v. Morrison*, 228.

PURCHASE.

By landlord of goods distrained with consent of tenant.—See LANDLORD AND TENANT, 1.

RAILWAYS AND RAILWAY COS.

1. *Accident—Negligence—Verdict against Railway Co. set aside—Evidence.*

The plaintiff sued as administrator of his wife, charging in his declaration that by and through the carelessness and negligence of defendants, and for want of sufficient fences, &c., the locomotive and train of defendants were driven against a carriage in which plaintiff's wife was driving along the highway, from the effects of which collision she died.

It appeared that plaintiff, with his wife and child and a couple of others, was returning from a picnic party, in a cab, along the highway, which at a certain place crossed defendants' line of railway. This crossing was not fenced, as required by law, and at the time in question a very long excursion train, no mention of which was contained in the company's timetables, was approaching at a rapid rate and came in collision with the cab, injuring plaintiff, his wife and child, and ultimately causing the death of his wife. The evidence shewed that the cab was being driven at a slow pace and upon an inclined plain towards the railway track, which was considerably elevated above the highway; that though there were some slight obstructions in the way, the train could be seen for some five hundred yards from the crossing, but that neither the driver nor any of the party was looking out for the approach of trains, and in fact that the former did not see the train in question until his horses feet were upon the track, when it was only some seventy yards distant from

him; whereas a witness, who was one of the plaintiff's party, stated that had he (cabman) been on the alert, they would all have been saved. It was further shewn that the driver knew the locality, having in fact driven plaintiff and party over it on their way to the picnic, and the preponderance of evidence was to the effect that the railway whistle was heard at a distance of three or four hundred yards from the crossing. The jury having, on this evidence, found for plaintiff,

Held, that he was not entitled to recover; for, though the not fencing of the crossing by defendants was negligence on their part and a disregard in that respect of their statutory duty, still it did not constitute such negligence *per se* that plaintiff must recover against them, however culpable he may himself have been, and though such want of fencing was not the cause or occasion of the accident: that to justify a recovery for such a cause, it must appear that the damage to plaintiff resulted from the omission to fence as the proximate, if not the direct cause of the accident, which the evidence did not warrant in this case, but rather that such damage arose from his own gross negligence, or that of his driver, in not keeping a proper look-out for the train, which, with this precaution, it clearly appeared, could easily have been avoided.

In an action by plaintiff against the same defendants, in his own individual right, for injury sustained from the same accident, the Judge at the trial at first directed the jury that, assuming defendants to have been guilty of neglect in not fencing, they must determine whether plaintiff did or did not so far contribute to the accident by

his own negligence or want of ordinary care and caution that, but for such negligence or want of care, the accident would not have happened:

Held, that this direction was right. But afterwards, at the request of plaintiff's counsel, who did not wish the question of contributory negligence to be left to the jury, the Judge, as he took the same view, did not charge them to find specially on the question of negligence generally, as applicable to the state of the road, when defendants' counsel objected; so that in the confusion which arose the question of community of default being understood to be withdrawn from the jury, they were led to believe that because defendants were in default, plaintiff must recover: on this ground therefore, the Court, Richards, C. J., *dissentiente*, granted a new trial without costs.—*Winckler (Administrator) v. The Great Western Railway Co.*, 250.

2. Receipt-note for freight—Special conditions—Damages.

Plaintiff's correspondents in Chicago delivered there to the Michigan Southern Railway Company certain articles of merchandize, to be transported to Toronto for plaintiff, that Company at the time of delivery giving a receipt-note to the effect that they had received from plaintiff's correspondents the merchandize in question, consigned to plaintiff at Toronto, to be transported over their line of road to their terminus, and delivered to the Company whose line might be considered a part of the route, to be carried to the place of destination; the Michigan Company not to be liable as common carriers for the

goods whilst at any of their stations awaiting delivery to the Company which was to forward them; with the farther proviso, that no Company or carrier forming part of the line over which the freight was to be carried, should be responsible for demurrage or detention at its terminus, or beyond or on any part of the line, arising from any accumulation or over pressure of business; and that "the Company" should not be liable for the destruction or damage of the freight from any cause whilst in the depot of the Company, or for any loss or damage from "Providential" causes, or from fire, whilst in transit or at the stations.

It appeared that there was an arrangement between the Michigan Company and the defendants that the latter should carry their freight from the terminus of their line to certain points in Canada, and that the freight in question here arrived in Detroit, the terminus of the Michigan Company, who telegraphed defendants' agent, the day before its destruction by fire, that it was in store, and requested them to forward it. It also appeared that at this time defendants had such an accumulation of freight on hand that they could not transport it all over their line, and could not therefore receive plaintiff's goods, which were destroyed by fire at the Michigan Company's Station in Detroit the day after the defendants were advised of their arrival. In an action against defendants for the value of the goods, charging a refusal on their part to receive them, in consequence of which they became lost to plaintiff, *Held*, that plaintiff could not recover, for that the receipt-note given by the Michigan Company

formed the basis of the contract to carry, and that they became the carriers; but that they only undertook to carry over their own line of road, and were plaintiff's agents to deliver over his merchandize to defendants to be carried to Toronto; but that the understanding between the Michigan Company and defendants, that the latter would, on certain terms, carry on the former's freight to Canada, created no privity between defendants and plaintiff, so as to enable him to sue defendants for not carrying out that arrangement; and that, even if defendants were bound to receive the merchandize at Detroit, for carriage to Toronto, the evidence shewed that they were not liable for not receiving, owing to the overcrowded state of their premises, and the pressure of freight upon them.

Held, also, that plaintiff could not, in any case, recover more than nominal damages, if even that, as the value of the goods, which had been destroyed by fire, would not be the damages which would naturally flow from a breach of contract, or refusal to carry, in disregard of defendants' common law obligation to do so; for that the loss by fire arose from the omission to insure, and it would by no means follow that, even if defendants had received the property, it might not have been on the express condition of exemption from liability in that event.

Held, also, that the condition that "the Company" should not be liable for loss from Providential causes, or from fire from any cause whatever, &c., applied to the Michigan Company alone, and not to defendants also.—*Crawford v.*

The Great Western Railway Company of Canada, 510.

(*Contract of directors individually.*)
See NEW TRIAL REFUSED.

♦—
RATIFICATION.

By creditors, of assignment to non-resident official assignee.—See INSOLVENCY, 2.

♦—
RECEIPT NOTE (FOR FREIGHT).

See RAILWAYS AND RAILWAY COS.

♦—
REJECTION OF EVIDENCE.

See INSURANCE, 1.

♦—
RENT.

Payable in advance.—See LANDLORD AND TENANT, 2.

♦—
RENT SECK.

Right of grantee to distrain in his own name—General issue by statute—4 Geo. II. ch. 28.

Defendant White, a lessee, sublet to plaintiff, and subsequently, by deed, granted two quarters' rent to defendant McLean, who distrained in White's name, and plaintiff brought an action, contending, 1st, that there could be no distress, and 2nd, that he had paid White without notice of assignment :

Held, that the grantee by deed of a rent-seck out of a term of years can, by virtue of 4 Geo. II. ch. 28, distrain for the same out of the land which was charged with its payment before it was granted ; that McLean, the grantee in this instance, could have distrained in

his own name, and that the defence could be set up under the general issue by Statute ; and that as McLean authorized the distress, and it was for his benefit, it was a sufficient answer, although the distress was in the name of White.—*Hope v. White et al.*, 430.*

♦—
REPLEVIN.

Local improvements—By-law good on face—Distress for rate levied.

The by-law of a Municipal Corporation passed in 1865, for the purpose of authorizing the levying of a rate for certain local improvements, in the shape of the pavement of sidewalks, after reciting some previous resolution of the Council accepting a tender for the work, and authorizing the passage of a by-law to levy a certain rate per foot frontage on the owners of real estate on the parts of several streets named, and that the required sum should be raised by local taxation upon the proprietors of the several lots of land adjoining said sidewalks immediately benefited thereby, "except that part on James Street opposite the Market Place, and those parts on Church Street opposite the several churches and school-houses ;" and that the persons named in the first column of the schedule annexed to the by-law were proprietors of the lands adjoining said sidewalks, not before excepted, and were immediately benefited thereby ; and that the whole of the said property so benefited was by the assessment roll of 1865 rated at \$12, 554, &c., &c.; provided that there should be raised from said proprietors 22½ cents in the \$, and that the

* This case is standing for judgment in Appeal.

collector for 1865 should collect the rate in the usual way. It then went on to repeal a by-law of 1864, authorizing the levying of the frontage-rate above referred to.

The work in question had been begun, finished and paid for in 1864, with the exception of \$659, which were paid before the passage of the by-law of 1865. It further appeared that persons were rated as proprietors, whose names did not appear on the assessment roll, and that all the streets affected were grouped together and rated at the said sum, instead of being assessed separately. There was the further fact that the whole of plaintiff's property at the corner of two streets was assessed, whereas the flagging extended only over a portion of it:

Held, that the by-law contained nothing objectionable on its face, because it appeared to be only for prospective work, and that therefore on the authority of *Jones v. Johnson*, 5 Ex. 861, an action would not lie against defendants (the collector and his bailiff) for enforcing the rate; that the proper course was to move to quash the by-law, and if quashed, then to proceed against the Corporation. But, *Held*, that assuming the by-law to be defective in providing for a debt of the previous year, it was merely providing in 1865 for a debt contracted and provided for by the by-law of 1864, but provided for imperfectly, which, *Seemle*, was not a violation of the rule against retrospective debts, but a mere repeal of a defective, doubtful or invalid rate, imposed within the jurisdiction of the Council, for another free from all objection.

Held, also, that it was no objection to the by-law that certain pro-

prietors were rated for the special rate, who were not on the general assessment roll; nor that the assessment value of 1864 was taken instead of that of 1865, as this did not appear on the face of the by-law and could not therefore be taken in this action; that as to the exception in favor of church and school property, under sec. 8 of the Assessment Act such properties were clearly exempted from local taxes; and that as to grouping the streets together, this also was plainly an objection on motion to quash the by-law, and therefore not open to plaintiff in this action. *Held*, also, that the whole of the plaintiff's property, as assessed, was liable, though the flagging extended over a portion only, as no doubt the whole was benefited by the partial improvement.

Held, therefore, that plaintiff's goods were properly distrained upon for the non-payment of the rate, and that *replevin* at his suit would not lie against defendants. —*Haynes v. Copeland et al*, 150.

See PLEADING, 8,

ROAD ALLOWANCES.

Right of licensees of Crown to cut timber on.]—See TIMBER LIMITS.

SALE OF GOODS.

Sale of goods by Sheriff—Statute of Frauds—Memorandum in writing—Delivery.

A sale of goods by a Sheriff or his bailiff under execution is within the 17th section of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing, in the same

manner as an auctioneer or his clerk.

The entry of defendant's agent as the purchaser is sufficient, if the defendant afterwards acknowledge the agent's authority, as was done in this case.

In this case a person, requested by the bailiff to act as his clerk, noted in pencil on the back of a letter the name of each purchaser, the article sold, and the amount bid; and after the sale was over, but on the same day, the bailiff made out a more extended memorandum, headed "List of goods sold and by whom bought, 17th October, 1866," and containing the article, the purchaser's name and the price. This he signed "D. Howard, Bailiff;,"

Held, insufficient, for it did not appear who the seller was, or the terms of sale, and the second memorandum could not bind, for the bailiff's authority continued only during the sale.

Defendant after the sale wrote to the Deputy Sheriff speaking of the engine, one of the articles claimed for, as being on his lot, which belonged to him, and having been bid in for him by Mr. T. (the agent who had purchased at the sale), and saying that he had heard the Sheriff's fees had not been paid and that he intended to sell again;

Held, insufficient, for it did not shew the terms of sale, and it was not evidence of a delivery to satisfy the Statute, which the other evidence tended strongly to disprove.

—*Flintoft v. Elmore*, 274.

—♦—

SALE OF LAND FOR TAXES.

1 *The Surveyor General's or the Commissioner of Crown Lands List*

—*Assessment—Treasurer's return—Writ a warrant to sell—Distress on land—Advertisement—Sale itself—Effect of payment—Description of land sold—Sheriff's deed—Law on the sale of land for taxes reviewed as determined by cases in regard to.*

Under the Statute 59 Geo. III. c. 7, 4th Sess., it was the duty of the Court of Quarter Sessions to assess the amount of taxes to be paid upon lands, not exceeding the sum of one penny in the £ of the statutable value, and where the Treasurer of his own motion charged every wild lot one penny in the £ of such value, the sale of land for such taxes was held invalid.

Quære, as to the manner in which wild lands of non-residents, not included in the assessment rolls, were to be rated under such Act, and *Semble*, such lands not assessable at all.

Tax Statutes should not be construed as Statutes creating a forfeiture, but rather in the same manner as Statutes by which lands are sold under execution for debt, and the same rules which apply to sales under execution should govern tax sales.—*Per A. Wilson, J.*

Strict proof should be given as to the legality of the tax and its actual imposition, but in matters concerning its collection unnecessary or unreasonable rigor in carrying out the clause of the Statutes should not be exacted from the officials entrusted therewith.—*Per A. Wilson, J.*

2. Where land has been sold for a larger amount of taxes than has been or can be lawfully imposed, such sale is void.

3. It is not necessary that the Treasurer should keep his accounts of taxes due according to the Statute, in order to validate the sale.

4. In this case it was held, following *Doe d. Mountcashel v. Green*, 4 U. C. R. 23, no objection to the sale, that part of the taxes for which the sale was made, accrued to the former Home District, while the sale was made by the Sheriff of the Simcoe District, to which district the residue of the taxes was owing.

5. The omission of the Treasurer to advertise the list returned by him to the Court of Q. S., within one month thereafter, and the omission to advertise such lot in the Official *Gazette*, and imperfections in the advertising, are irregularities cured by 6 Geo. IV. c. 7, s. 22, and by analogy to the holding of the Courts in the cases of sales under execution.

Considerations as to what requirements of the Tax Acts are imperative and what are merely directory.

6. The Sheriff's advertisements of the sale and its postponement in the *Gazette* in these cases were held sufficient.

7. It is competent to sell the whole of a lot for taxes, and the Court will not presume against a sale on the supposition too much land was sold for a small amount.

8. When, before conveyance, the Acts under which the sale is made are repealed without any saving clause, the Sheriff's deed subsequently given will be void (following *Bryant v. Hill*, 23 U. C. R.

96); but it is competent for the purchaser to set up a defence under the Sheriff's certificate given at the time of sale, notwithstanding he has given it up on receiving the invalid conveyance.

9. Sales for taxes made after return day, of the writ to sell are valid.

10. When taxes are in fact imposed on patented lands, and no return of the Surveyor General of the land having been granted can be found or proved, such return may be presumed.

11. When, owing to land being patented in July, taxes are charged thereon only for half a year, yet that is in effect a taxation for the whole of the fiscal year, and so long as the patent issues before the assessment is completed, taxes for the whole of the year wherein such patent issues may be properly imposed, and the lands sold therefor if unpaid.

12 Under the Sheriff's certificate the purchaser is entitled to possession of the land sold, and being in part possession he can avail himself of such certificate, as a defence to an action of ejectment by the owner of the land, even though he has not received a deed, or a valid deed, from the Sheriff; and, *Semble*, he could maintain ejectment on such certificate against any one in possession under the former owner. — *Cotter v. Sutherland, Stevens et al. v. Jacques*, 357.

2. *Non-resident land—Taxes not due for five years—Deed by Sheriff's successor—C. S. U. C. ch. 55, sec. 97—27 & 28 Vic. ch. 28, sec. 43.*

The Collector's roll was delivered to him on 26th August, 1852, and

the Treasurer's warrant, under which the Sheriff sold the land, which was non-resident land, for unpaid taxes, was issued on 11th August, 1857:

Held, that, as under sec. 42 of the Assessment Act of 1853 (C. S. U. C. ch. 55, sec. 97), the taxes could not be considered due until one month after the Collector had received his roll, the taxes for that year were not due at the time the roll was delivered to him, and that therefore no portion being due for five years on 11th August, 1857, the sale was void.

Seemle, per A. Wilson, J., that the taxes of the preceding year, for the purposes of sale for arrears, are not to be considered as in arrear till after the expiration of the year in which they are imposed.

Seemle, that a deed, made by the successor of the Sheriff, who made the sale for taxes, is good under 27 & 28 Vic. ch. 28, sec. 43.—*Bell v. McLean*, 416.

SATISFACTION.

Of rent of demised premises, by payment of purchase money under agreement for purchase.

See LANDLORD AND TENANT, 2.

SECOND APPLICATION.

When allowable—Practice.

Defendants obtained a rule *nisi* in Practice Court to set aside a judgment in ejectment and *hab. fac. poss.* issued thereon, which was enlarged into Chambers and then into the full Court, the enlargements being obtained for the purpose of enabling defendants to file

affidavits shewing the relief given them by the Court of Chancery against said judgment, on a contemplated application there. These affidavits it was agreed by plaintiff's counsel might be used in support of the rule already issued, though necessarily sworn subsequently to it; but notwithstanding this agreement, he afterwards insisted to defendants' counsel that the affidavits could not, either by the practice of the Court, or under the agreement, be used by defendants. Defendants thereupon moved a new rule in similar terms to the other, in order that the affidavits referred to might come before the Court, stating at the same time all the facts connected with the case, and the reasons for making the second application:

Held, on motion to set aside this rule, as vexatious, that it did not in its facts come within the class of decided cases in which a second application was held to be wrong, as neither the Court nor any Judge had disposed of the defendants' application up to the time of moving the second rule, and the facts of the case had all been mentioned on the motion for the same.

Held, also, that the statement made by defendant's counsel, on moving the second rule, as to the course he was taking and his reasons for taking it, in effect amounted to an abandonment of the original rule.

Seemle, that the special application to set aside the rule was unnecessary, as the objection taken could not have been urged on shewing cause to it.

Quære, whether the affidavits in question could, under the agreement referred to, have been read

in support of the original rule.—
Heyland v. Scott et al., 52.

SEDUCTION.

See PLEADING, 7.

SPECIAL CONDITIONS.

See RAILWAYS & RAILWAY COS.,
2.

SPECIFIC CHARGES.

*Right to recover under general
allegation in declaration.*

See WITNESSES AND EVIDENCE.

STATUTE OF FRAUDS.

See SALE OF GOODS.

STATUTES (CONSTRUCTION OF).

29 *Ch. II. ch. 3.*]—See SALE OF
GOODS.

4 *Geo. II. ch. 28.*]—See RENT
SECK.

59 *Geo. III. ch. 7. s. 4.*]—See
SALE OF LAND FOR TAXES, 1.

6 *Geo. IV. ch. 7, s. 22.*]—See
SALE OF LAND FOR TAXES, 1.

C. S. U. C. ch. 35, s. 13.]—See
MARRIED WOMAN,

Ch. 45, s. 4.]—See LANDLORD
AND TENANT, 1.

Ch. 55.]—See DISTRESS FOR
TAXES.

Ch. 55, s. 97.]—See SALE OF
LAND FOR TAXES, 2.

*Ch. 64, ss. 50, 51, 57, 91 sub-sec.
2.*]—See PLEADING, 1.

Ch. 65.]—See BILLS OF EX-
CHANGE AND PROMISSORY NOTES.

Ch. 90, s. 7.]—See LANDLORD
AND TENANT, 3.

Ch. 93, s. 35.]—See SURVEY OF
TOWNS AND VILLAGES.

24 *Vic. ch. 23, s. 1.*]—See WARE-
HOUSE RECEIPT.

27 & 28 *Vic. ch. 28, s. 43.*]—See
SALE OF LAND FOR TAXES, 2.

29 *Vic. ch. 28, s. 7.*]—See PLEAD-
ING, 3.

SURVEY OF TOWNS AND VILLAGES.

*Work upon the ground—Plan—C.
S. U. C. ch. 93, sec. 35.*

Under the latter part of sec 35 of
ch. 93 C. S. U. C., the work upon
the ground, in the original survey
of towns and villages, to designate
or define any lot, shews its true and
unalterable boundaries, and will
over-ride any plan of such lot.—
McGregor v. Calcutt, 39.

TAXES.

*Liability of landlord for, where
lease silent as to.*]—See LANDLORD
AND TENANT, 4.

See DISTRESS FOR TAXES.

“ SALE OF LAND FOR TAXES, 1,
2.

TENDER.

See CONDITION PRECEDENT.

TIMBER LIMITS.

*Road allowances—Right of licen-
sees to cut timber on.*

Licensees of the Crown of timber
limits, covering allowances for
roads, are not liable to be sued for
cutting timber on such road allow-
ances, under the authority of the

Crown, when no steps have been taken by the Municipality to pass a By-law dealing with such timber. — *The Corporation of the Township of Burleigh v. Campbell et al.*, 457.

TOTAL LOSS.

See MARINE INSURANCE.

TRESSPASS.

See LANDLORD AND TENANT, 3.

“PUBLIC MARKET.

TROVER.

See CONDITION PRECEDENT.

UNSEAWORTHINESS.

See EVIDENCE.

VENDOR'S LIEN.

See INSURANCE, 2.

WAIVER.

After maturity of note and without consideration.]—See CONDITION PRECEDENT.

WAREHOUSE RECEIPT.

Insurance—Insurable interest—Warehouse receipt—Increase of risk—Perverse verdict.

In an action on a policy of insurance by A., brought for the benefit of B., an incorporated Bank, to whom the policy had been assigned, on a traverse of any insurable interest in B., *Held*, that a

warehouse receipt for wheat, the property of A., a warehouseman, signed by a clerk of A., in his own name, was sufficient, under Stat. 24 Vic. ch. 23 sec. 1, to pass the property in the wheat so as to confer an insurable interest in B.

The policy was subject to a condition that in the event of any alteration, &c., *whereby the risk should be increased and a consequent additional premium required*, the policy should be void, unless notice of such alteration, &c., should be given to defendants and allowed by endorsement on the policy, and consequent additional premium paid.

It appeared in evidence that at the time the policy was effected by A, he was told by the agent of the defendants that if an elevator was erected on the premises without informing the defendants, his policy would be avoided, as, in that case, he would have to pay an additional premium, but this was not inserted in the policy. A. erected an elevator on the premises, and did not give notice to the defendants :

Held, on a plea setting out the condition and alleging the erection of the elevator, and that the risk was thereby increased, *and that a consequent additional premium would have thereby been required*, that the jury not having found any increase of risk, the facts afforded no defence.

Semle, that a verdict is not perverse, where a jury find against the direction of a Judge on a point of law, unless the ruling of the Judge is correct.—*Todd v. The Liverpool and London Globe Insurance Company*, 192.

WITNESSES AND EVIDENCE.

Competency of witness—General allegation in declaration—Right to recover specific charges—Excessive damages

A brother of the plaintiff, having been called as a witness on the latter's behalf, stated on his *voire dire* that the plaintiff resided in a foreign country, and that his business was carried on by him in the plaintiff's name, under an agreement between them, that he was first to get his support out of it, and then hand over the surplus, if any, to the plaintiff. It further appeared that the contract in question in the suit was made by the plaintiff with defendants, and there was no evidence to shew that the witness had brought the action, or given the instructions for the bringing of it, or that he was responsible for the costs of it, or that it had not been solely and directly brought by the plaintiff himself :

Held, that the witness was not incompetent.

Under a general allegation in the declaration, that plaintiff had incurred expense in replacing, altering, and repairing certain locks, the subject of the contract, *Held*, that plaintiff could properly claim the cost of the alterations and certain travelling expenses to which he had been put in connection therewith.

The contract price for the locks in question was \$52, whilst the jury gave the plaintiff \$397.50 damages, which were proved to be the expenses to which he had been put by reason of defendants' failure to carry out the contract : *Held*, not excessive.—*Lalor v. Burrows et al*, 321.

WORDS, (MEANING OF).

Owner.—See INSURANCE, 1, 2.

False swearing.—See INSURANCE, 2.

ERRATA.

At p. 151 in the 8th line of the last paragraph but two of the head-note, in lieu of "No objection," read *an* objection.

At p. 357, at No. 3 of head-note, in lieu of "It is necessary," read It is *not* necessary.

At p. 384, in second line of judgment, in lieu of "tax rate," read *tax title*.



